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CIVIL
PROCEDURE REPORTS.
CONTAINING CASES UNDER THE
CODE OF CIVIL PROCEDURE
AND
THE GENERAL CIVIL PRACTICE
OF THE
STATE OF NEW YORK.

REPORTED WITH NOTES
BY
HENRY H. BROWNE
OF THE NEW YORK BAR.

WITH A REFERENCE TO THE SECTIONS OF THE CODE OF CIVIL PROCEDURE CONSTRUED OR CITED IN THE OPINIONS CONTAINED IN THE FOLLOWING REPORTS, ISSUED DURING THE PERIOD COVERED BY THIS VOLUME : NEW YORK REPORTS, VOLS. 100, AND 101 ; HUN'S REPORTS, VOLS. 38 AND 39 ; HOWARD'S PR. N. S. VOL. 3 ; AND N. Y. CIVIL PROCEDURE REPORTS, VOL. 9.

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- ARBITRATION.** Creation of State board of, authorized. Chap. 410.
- The amicable adjustment of grievances and disputes, that may arise between employers and employes, provided for. Chap. 410.
- ASSESSORS.** Official acts of certain legalized, and failure to take oath, remedied. Chap. 200.
- ASSIGNMENT FOR BENEFIT OF CREDITORS.** Payment of wages or salaries of employes of insolvent, provided for (Laws of 1877, chap. 466, amended). Chap. 283.
- BUSINESS CORPORATIONS.** See "CORPORATIONS."
- CORPORATIONS.** Taxed for privilege of organizing. Chap. 143.
- The winding up of corporations which have been annulled and dissolved by legislative enactment, provided for. Chap. 310.
- An act to facilitate closing up the affairs of insolvent life insurance, and annuity company. Chap. 436.
- The act (Laws of 1875, chap. 613, § 15), authorizing the formation of corporations for the safe-keeping and guaranteeing of personal property, amended.
- Time for payment of capital stock of certain business corporations, and for taking proceedings to reduce the same, extended. Chap. 579.
- Act (Laws of 1875, chap. 611), providing for the organization and regulation of certain business corporations, amended. Chap. 586.
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- Incorporation of indemnity companies provided for. Chap. 611.
- See "MUNICIPAL CORPORATIONS;" "RECEIVERS."
- COUNTY CLERKS.** Authorized to certify and sign records of predecessor in office. Chap. 341.
- FIDELITY COMPANY.** See "CORPORATIONS."

- GUARANTEE COMPANIES.** See "CORPORATIONS."
- INDEMNITY COMPANIES.** See "CORPORATIONS."
- INSOLVENT ASSIGNMENT.** See "ASSIGNMENT FOR BENEFIT OF CREDITORS."
- JUSTICES OF THE PEACE.** Official acts of certain legalized. Chaps. 23, 210.
—Authorized to execute and file official bond. Chaps. 23, 210, 461.
- LIEN.** The collection of demands against ships and vessels provided for (Laws of 1862, chap. 482, § 2, amended). Chap. 88.
- LIFE INSURANCE AND ANNUITY COMPANIES.** See "CORPORATIONS."
- MECHANIC'S LIEN.** Operation and effect of act of 1885 (chap. 342), limited. Chap. 382.
- MUNICIPAL CORPORATIONS.** Certain actions against, limited. Chap. 572.
- NAME.** Transacting business in fictitious firm names, prohibited (Laws of 1833, chap. 281, amended). Chap. 262.
- NOTARIES PUBLIC.** Appointment of additional, authorized (Laws of 1879, chap. 254, amended). Chaps. 230, 359.
- RAILROADS.** Consent to construction of, and order confirming report of commissioners, not impaired by dissolution or annulment of charter. Chap. 271.
—See "CORPORATIONS;" "RAILROAD COMMISSIONERS."
- RAILROAD COMMISSIONERS.** Act (Laws of 1884, chap. 441), defining duties of certain officers of Board of Railroad Commissioners, and regulating the power of issuing subpoenas, and limiting the number of clerks therein, amended.
- RECEIVERS.** Fees of, of corporations, fixed (Laws of 1873, chap. 378, amended). Chap. 275.
- REVISED STATUTES.** Certain portions thereof, and laws amendatory thereof, repealed. Chaps. 257, 340, 593.
- SALE.** Act of 1885 (chap. 448), relative to filing contracts for conditional sales of personal property, amended. Chap. 495.
- STENOGRAPHER.** Judge of superior court of Buffalo authorized to employ (Laws of 1874, chap. 57, § 230, amended). Chap. 359.
—Appointment of, by justice of the supreme court, holding special term in the fourth judicial district, authorized. Chap. 401.
- SUPERIOR COURT OF BUFFALO.** See "STENOGRAPHER."
- SUPREME COURT.** See "STENOGRAPHER."
- SURROGATE.** Election of certain, provided for, and their terms of office fixed (Laws of 1871, chap. 859, amended). Chap. 164.
- USES AND TRUST.** 2 R. S. part 2, chap. 1, title 2, article 2, § 65, relating to, amended. Chap. 257.

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CIVIL PROCEDURE REPORTS.

THE MERCHANTS' NATIONAL BANK OF THE
CITY OF NEW YORK, RESPONDENT, *v.* SHEE-
HAN, APPELLANT.

COURT OF APPEALS, JANUARY, 1886.

§§ 870, *et seq.* 876.

*Examination of party before action brought.—Power of Court to order.—
Contempt.*

An order for the examination of a person against whom an action is about to be brought may be granted before an action is actually commenced, upon the application of the person who is about to bring the action, and a refusal to submit to an examination under such an order is a contempt and punishable as such. The granting of such an order upon the application of the proposed plaintiff is within the discretion of the Court, but it can rarely happen that justice will be promoted by granting it, and the practice, unless carefully guarded, may lead to great abuse.

(Decided January 19, 1886.)

Appeal from order of general term of Supreme Court, First Department, modifying and affirming as modified an order of the New York County special term adjudging the appellant guilty of a contempt.

The respondent, on proof that it expected to bring an action against the appellant, Sheehan, and another in the nature of a creditor's bill on a judgment recovered

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by it against said Sheehan, moved at Special Term of the Supreme Court in New York county for the examination of said Sheehan before action brought, as an expected party. Said Sheehan appeared by counsel and opposed the motion, which was granted, and an order made requiring him to appear before a referee appointed for that purpose and submit to an examination. He appeared pursuant to the order, but refused to be either sworn or examined.

The referee reported the facts to the court at special term, which, after due notice, adjudged him guilty of contempt, and fined him the costs and expenses, including counsel fee, of the appellant in the proceeding. The general term, on appeal, modified the order thereupon entered and affirmed it as modified, and this appeal was thereafter taken from the order entered on its determination.

No opinion was written at general term, but its decision in which all the Judges (Davis, *P. J.*, Brady and Daniels, *JJ.*) concurred, and the reasons therefor were stated in the following memorandum filed by them: "Order modified by reducing the fine to \$94.35, and as so modified, affirmed without costs to either party, on the ground that while the order remained in force the appellant was obliged to obey its directions."

All the proceedings were entitled as in an action, although a summons had neither been issued or served.

M. J. Scanlan, for appellant.

The order is appealable. *Brinkley v. Brinkley* (47 N. Y., 40); *Sudlow v. Knox*, (4 *Abb. Ct. App. Dec.*, 326); *People v. Dwyer* (90 N. Y., 402). In order to render a party liable for contempt in disobeying an order of the Court or of a Judge, it must appear that it was a lawful mandate. *Code of Civil Procedure*, § 14; *People v.*

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Riley, 25 *Hun*, 587; O'Gara v. Kearney, 77 *N. Y.*, 423; People v. Edson, 52 *N. Y. Super.*, (20 *J. & S.*) 53; *In re Fisk*, 7 *N. Y. Civ. Proc.*, 169, 172, 182. Before a party can be imprisoned for contempt a reasonably clear case upon the law and the facts should be made, and there should be an adjudication that the alleged misconduct defeated, impaired, impeded or prejudiced a right or remedy for a party to a civil action. Fischer v. Raab, 81 *N. Y.*, 235. The right of a party to the examination of his adversary is strictly statutory. Independent of the statutes there is no such right. The court has no inherent or common law power to order the examination. The statute points out how the examination is to be procured, and the mode must be followed. Heishon v. Knickerbocker L. I. Company, 77 *N. Y.*, 278. The order for examination was void, because no action was commenced. The Code provides (§ 870) that "the deposition of a party to an action or of a person who expects to be a party to an action" may be taken. The order for the examination in this matter directed the examination of one whom the Merchants' National Bank expected to make a party to an action which it expected to bring. It is manifest that an expectation can only be proven by himself; that provision is only made for the examination of an expected party when he himself applies for it, and not for the examination of a party not yet sued at the instance of another who contemplates a suit against the former. Paulmier v. Sweeny, 56 *How. Pr.*, 1; S. C., 5 *Abb. N. C.*, 151. . . Such an examination will not be allowed for the purpose of informing the plaintiff whether he has a cause of action or not. A fishing excursion was never allowed. DeLeon v. DeLima, 66 *How. Pr.*, 287. Section 870 provides that the examination referred to may be taken at his own instance (the instance of the person to be examined), or at the instance

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of the adverse party. Inasmuch as no action has been commenced, the Merchants' Bank is not an adverse party. *Paulmier v. Sweeny*, 5 *Abb. N. C.*, 151. Before the Code of Civil Procedure it was necessary that there should be actual service of process or appearance of defendant before examination could be taken (2 R. S., 391, § 1; *Code of Procedure*, § 390).

George Zabriskie (*Burrill, Zabriskie & Burrill*, attorneys), for respondent.

ANDREWS, J.—The question on this appeal depends upon the construction of section 870 of the Code, which is as follows: "The deposition of a party to an action pending in a court of record or of a person who expects to be a party to an action about to be brought in such a court . . . may be taken at his own instance or at the instance of an adverse party or of a co-plaintiff or co-defendant at any time before the trial as prescribed in this article." The question presented is whether this section authorizes an order for the examination of a person against whom an action is about to be brought upon the application of the person who is about to bring such action but before it has been actually commenced.

The section is obscure, and its interpretation is by no means clear. The deposition to be taken is of the person who expects to be a party. A person who contemplates bringing an action expects to be a party thereto, and it seems to be clear under the section he can procure his own testimony to be perpetuated. The person against whom the action is to be brought may expect to be sued. A suit may have been threatened, or he may know that a cause of action has accrued against him, or that a liability is claimed likely to result in litigation. Is the remedy given by this section available to either of the persons so situated, and may an order be granted before

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suit brought upon application of either for the examination of his adversary ?

Considering this section alone, the most natural meaning would seem to be that a person who expects to become, or to be made a party to an action, may, on his own application, have his deposition taken in anticipation of the actual commencement of the suit, and that the words : "or at the instance of an adverse party," only apply when the person seeking the examination of his adversary is a party to a pending action. The change of phraseology by the substitution of the word "party" in the second clause for the word "person" in the first clause gives some force to this construction. But section 876 seems to render it clear that a proceeding under section 870 may be instituted by an adverse party against the other, although no suit has been commenced, but is only contemplated. That section provides that certain specified sections for the punishment of contumacious witnesses shall apply to the examination of a party or a person expecting to be an adverse party. It would be absurd to provide for the punishment of a person who sought to perpetuate his own testimony. The section plainly was intended to provide for the case of a contumacious witness expected to be made a party to an action, whose examination was sought by his adversary.

On the whole we are of the opinion that the order issued in this case on the application of the Bank for the examination of Sheehan, against whom the Bank was about to commence an action, was authorized, and that he was in contempt for disobeying it. The Bank might have commenced its action, and then have procured an order for the examination of the defendant. The granting of an order in such a case as this before suit brought upon the application of the proposed plaintiff is within the discretion of the Court, but it can rarely happen that

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justice will be promoted by granting an order on the application of the proposed plaintiff before the commencement of an action, and the practice, unless carefully guarded, may lead to great abuse.

The order should be affirmed.

All concurred.

MACKELLAR, RESPONDENT, v. ROGERS, IMPLEADED, ETC., APPELLANT.

SUPERIOR COURT OF THE CITY OF NEW YORK, GENERAL TERM, DECEMBER, 1885.

§§ 968, 970, 974.

*Trial by court or by jury.—Jury trial in equitable action.—How obtained.
—How waived.*

Where in an action for equitable relief, triable by the court, the answer sets up counter-claim, founded on a cause of action at law, a party who desires a jury trial of the issues on the counter-claim must within ten days after joining of issue on the counter-claim proceed under Rule 31 of the General Rules of Practice, to give notice of a special motion on the pleadings that the issues or any specific questions of fact be tried by a jury. A jury trial, in such a case, is not a constitutional, but purely a statutory right, and is waived by an omission to apply therefor as provided by the rules, and cannot be demanded on the trial at special term as a right, but the Court has discretionary power to postpone the trial to permit such a motion to be made.

The nature of an action, and the mode of trial of the issues tendered by the complaint are in every case determined by the complaint.
(Decided December 7, 1885.)

Appeal from a judgment of the special term decreeing foreclosure and sale of mortgaged premises.

The facts and exception appear in the opinion.

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Martin J. Keogh, for defendant-appellant.

George M. Mackellar, for plaintiff-respondent.

FREEDMAN, J.—The only question presented by the exceptions is whether the trial of the action should or should not have been postponed until after a trial by jury was had, of the issues arising upon the defendant's counter-claim.

The action was brought for the foreclosure of a mortgage for \$15,000 and interest. By his answer the defendant admitted all the facts set forth in the complaint, and then set up a counter-claim against the plaintiff for about \$51,000 for a breach of contract, upon which he demanded an affirmative judgment. The plaintiff replied to the counter-claim. Both parties noticed the case for trial at special term, but when it was called for trial in its order upon the calendar the defendant, before any evidence was given, demanded a trial by jury of the cause of action embraced in his counter-claim, as his constitutional and legal right. The motion was denied upon the ground that the proper mode of applying for a jury trial under such circumstances, was by special motion to have issues framed and sent to a jury. To this ruling and denial of his motion the defendant duly excepted.

The defendant then asked leave to make application at special term for the framing of issues. This motion was also denied, and the defendant duly excepted. The defendant thereupon withdrew from the case.

There can be no doubt that the claim of the defendant, as stated by the counter-claim, is one upon which, in a separate action directly brought upon it, he would be entitled to a jury trial as a matter of right. But from this it by no means follows that he can rightfully claim the same mode of trial in the present action.

The constitutional right to a jury trial extends only

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to cases in which it existed prior to the adoption of the constitution. In the case at bar there is no such right, because the action is an equitable one, which at all times was, and now is, triable by the court alone, formerly by the court of chancery, now by the court at special term, and because in the court of chancery of this State the right of set-off in such an action existed solely by virtue of the provisions of the Revised Statutes, * (Chapman v. Robertson, 6 Paige, 627; Jennings v. Webster, 8 ib. 504), which conferred no right of trial by jury, although the court had discretionary power to frame a feigned issue and order that to be tried by a jury.

Since that time the practice in this respect has been considerably changed. The jurisdiction of courts of law and of courts of equity has been blended; feigned issues have been abolished, and the practice of framing issues has been substituted, and the right to interpose counter-claims has been enlarged. It consequently remains to be seen whether there is any statutory ground for the contention of the defendant.

Section 974 of the Code of Civil Procedure provides that "where the defendant interposes a counter-claim, and thereupon demands an affirmative judgment against the plaintiff, the mode of trial of an issue of fact, arising thereupon, is the same as if it arose in an action, brought by the defendant, against the plaintiff, for the cause of action stated in the counter-claim, and demanding the same judgment."

This section, therefore, upon an issue arising upon a counter-claim like the one in suit, confers a right of trial by jury, because the defendant would be entitled to such trial, if he were to bring an independent action upon the same claim.

But the right is a purely statutory one. The section is not mandatory upon the defendant. It gives him an

* 2 R. S., p. 354, §§ 12 et seq.

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option whether he will have such trial or not. If he wishes to obtain the benefit of the statute in an action triable by the court alone, he must proceed to exercise his option and take certain steps. His remedy is under section 970, which provides that "where a party is entitled, by the constitution, or by express provision of law, to a trial by a jury of one or more issues of fact, in an action not specified in section 968, . . . he may apply, upon notice, to the court for an order, directing all the questions arising upon those issues, to be distinctly and plainly stated." Section 968 does not help a defendant in such case to escape from the necessity of making his motion or application, because, besides the action of ejectment, for dower, for waste, for a nuisance, and to recover a chattel, it covers only cases in which *the complaint* demands judgment for a sum of money.

The fact is that the different provisions of the Code of Civil Procedure bearing upon the point under consideration can be harmonized in no other way than by holding that the only remedy of a defendant in such a case is under section 970. This alone would be sufficient to call for the construction of section 974 hereinbefore contended for. But there are additional considerations of great weight. The character of an action, and the mode of trial of the issues of fact tendered by the complaint therein, are in every case determined by the complaint. The intent of section 974 is to enable a defendant to have his counter-claim considered in the disposition of plaintiff's case, whether such case be of legal or equitable nature. In other words, the defendant may, in all cases, have his counter-claim determined in connection with the claim made by the plaintiff as one of the issues in the case. But this involves that the defendant must proceed in such a way that the court can do it without unnecessarily delaying the plaintiff's case upon the main issue. If the

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cause of action brought by a plaintiff into court is one which must be determined by the court without a jury, the counter-claim of the defendant, though it may be triable by jury at the option of the defendant, must be presented at the trial of the main issue in such a shape that due effect can be given to it at the close of plaintiff's evidence. For these reasons it would be unjust to construe section 974 to mean that the defendant in such a case, after the joinder of issue upon the counter-claim, may sit still for months until the case is reached for trial in its order upon the special term calendar, then try plaintiff's side of the case, which is the main issue, and after all that, when defeated upon that, claim a jury trial upon his separate issue, and thus prevent a final judgment for many more months, if not years. But this is what the defendant's contention upon the present appeal amounts to, especially in view of the fact that his answer contains an express admission of all the material allegations of plaintiff's complaint.

From what has already been said it sufficiently appears that defendant's remedy to obtain a jury trial upon his counter-claim, was by special motion under section 970. Such motion, under Rule 31 of the General Rules of Practice, should have been made within ten days after joinder of issue. By failure to thus move for the framing of issues, and by giving notice of trial for the special term, the defendant waived his right to a jury trial under section 974. After it had been waived, and when the case was actually called for trial in its order upon the calendar, it was discretionary with the court to grant a postponement of the trial for the sole purpose of enabling the defendant to do what he might have done long before. The case discloses no reason why the exercise of that discretion should be disturbed. The defendant, by refusing to litigate his counter-claim and withdrawing from

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the case, preserved his right to enforce it in a separate and independent action.

The judgment appealed from should be affirmed, with costs.

VAN VORST, J., concurred.

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WILDER, APPELLANT, TUTTLE AND ANO., RESPONDENTS.

N. Y. COURT OF COMMON PLEAS, GENERAL TERM,
FEBRUARY, 1886.

§§ 585, 586, 3272.

*Security for costs.—Title to deposit made by third party. —Attorney.—
Power of court to order repayment into court of moneys received by.*

The title to money deposited as security for costs, *a. g.*, by the attorneys of a non-resident plaintiff, remains in the depositor, subject only to the contingency for which it was deposited. Where such a deposit made by a third party has been paid over by the clerk to the attorney for defendant under an *ex parte* order in supplementary proceedings, founded on a judgment in an action for the same cause, the court, upon its appearing that the title to the deposit is in such a third person, may order the attorney to repay the same into court, to the end that such application may be made in respect thereto as the parties interested therein may be advised, it not appearing that such attorney has paid the money over to his client; and an allegation that he "has accounted for it" to his client furnishes no defence to an application for such an order.

(Decided February 1, 1886.)

Appeal by defendant's attorney from an order of the general term of the city court of New York, affirming an order made at special term, directing, among other

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things, said attorney to repay to the clerk of the court the sum of \$250 received by him from said clerk.

The opinion states the facts.

Edward P. Wilder, for appellant in person.

Flanders & Tuttle, for respondents.

BOOKSTAVEN, J.—The plaintiff commenced this action in the city court to recover \$800 for money loaned. The defendant resisted on the ground that the action was prematurely brought, the loan not being due; and in this connection was successful, recovering judgment against the plaintiff for \$270.64 costs.

Subsequently, and when the loan became due, a second action for the same cause was commenced by the plaintiff in the same court. Plaintiff being a non-resident of the city, the defendant obtained an order in the usual form, requiring him to file security for costs. In compliance with this order plaintiff's attorney, in the second action, without consulting with their client, on April 8, 1885, deposited with the clerk of the city court \$250 of their own money as such security, and took a receipt therefor, showing that the money had been deposited by plaintiff's attorneys in that action.

On the 10th or 11th of April, 1885, the defendant, by his attorney, in both actions, obtained an order based on the judgment for costs in this action for the examination of the clerk of the city court concerning the property of the plaintiff said to be in his possession; and on the 13th of April, after an examination of the clerk, obtained an order, directing him to pay over the \$250, deposited as security for costs in the second action, to the defendant's attorney in both actions, "on account of the judgment recovered against the plaintiff in this action." Under

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this order the clerk paid the money so deposited to defendant's attorney.

On the 8th of May, 1885, the plaintiff obtained a verdict in his favor in the second action for \$896.

On the 23d of May the city court, at special term, after fully hearing the parties interested, found that the money deposited with the clerk of that court "was the property of Tuttle & Goodell, the attorneys for the plaintiff in the second action," "and that it was deposited subject to any claim that might arise against the plaintiff for costs in that action, and not otherwise;" and thereupon vacated the order of April 13th, and ordered the defendant's attorney to "restore and pay over to the clerk of this (the city) court said sum of \$250, to the end that such application may be made in respect thereto, as the parties interested therein may be advised."

From this order the defendant and his attorney appealed to the general term of the city court, where the order was affirmed; and from such affirmance defendant's attorney now appeals to this court.

The principal question to be determined on this appeal is whether, when money is deposited by another for a non-resident plaintiff, as security for costs, it is to be regarded as plaintiff's money for all purposes; or whether it is deposited merely as security, the title to it still remaining in the depositor, and subject only to the contingency for which it was deposited.

The appellant contends that such a deposit must be deemed the plaintiff's property for all purposes; and cites *Salter v. Weiner*, (6 *Abb.* 191); *Herman v. Aaronson*, (8 *Abb. N. S.*, 155); and *Commercial Warehouse Co. v. Graver*, (45 *N. Y.*, 393), in support of his contention. It will be observed that all of these cases are adjudications upon deposits in lieu of bail.

The argument in the two cases last cited was based

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upon the provisions of section 200 of the Code of Procedure, being section 585 of the Code of Civil Procedure.

The section, as far as relates to the matter in hand, is as follows : " If money deposited is not refunded, as prescribed in the last section, it is, in a case where the order of arrest could be granted only by the court, subject to the direction of the court, as justice requires, before and after the judgment. In any other case, if it remains on deposit, when final judgment is rendered for the plaintiff, it must be applied, under the direction of the court, in satisfaction of the judgment, and the surplus, if any, must be refunded to the defendant, or his representative."

By force of this section, the money so deposited in lieu of bail, if not refunded as prescribed in the Code, becomes subject to the direction of the court, as justice requires in the one case, or to be applied in satisfaction of the judgment in the other; no matter in whom the legal title may be. And if the real owner of the deposit is a third person, he cannot be heard to complain, if it is so applied, for he deposited it subject to such a contingency. No case has been cited except *Salter v. Weiner*, which holds that the mere deposit of the money makes it the property of the defendant, or regards it as a loan to him; and this case was reversed at the general term.

In the *Commercial Warehouse Co. v. Graver*, (45 N. Y., 393), the court, speaking of money deposited in lieu of bail, and remaining on deposit after judgment, says: " When the money deposited, in fact belongs to the defendant, there is no injustice or hardship in thus laying hold of it; but when it is deposited by a third party, in lieu of giving a bond, it is more harsh in its operation than the rules ordinarily applied to bail. It is the policy of the law to favor bail; and they are generally permitted, after judgment against their principal, and even after

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suit brought against themselves, to surrender their principal in their own exoneration. . . . Still, if the plaintiff has, by strict law, become entitled to appropriate the money of Alexander (the party depositing it), his right must be enforced," clearly recognizing the title to the money, even after judgment, as remaining in the third party.

Section 586 of the Code now provides that upon taking the proper measures, the money, while on deposit, shall be deemed the property of any third party the defendant may direct, subject to the contingencies before noted, and subject to the rights of creditors, if the direction was given for the purpose of hindering, delaying or defrauding them.

The case of *Dunlop v. The Paterson Fire Insurance Co.*, (74 N. Y. 145), is not in point, as, in that case, there was no dispute respecting the title to the money deposited, but the question was whether money conceded to belong to the appellant, and deposited by him with the clerk of the court, in lieu of an undertaking on appeal, was liable to attachment in an action by a third person against the depositor.

If now we turn to section 3272 of the Code, we find it only requires that the money be deposited as security for costs, and is to be applied to the payment of costs, if any are awarded against the plaintiff. If costs are awarded, it is to be applied to their payment, no matter whose money may have been deposited. It is deposited subject to this contingency and no other. The money of a third party, so deposited, as fully satisfies the law as if it were the plaintiff's.

We, therefore, conclude that the title to money deposited as security for costs remains in the depositor, subject only to the contingency for which it was deposited.

In the case under consideration the event of the sec-

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ond action has demonstrated the fact that the defendant in that action was not entitled to costs, and the deposit ceased to be security; and, as it belonged to third persons, they become entitled to its return, if not to themselves, at least to the court from which it was taken.

The proceedings resulting in the order of April 13th did not apprise the court that the money was deposited in an action other than the one in which the order was granted, nor that it belonged to third parties, and when these facts were brought to its attention, it clearly had the right to vacate the erroneous order.

We also think that on the facts in this case, the court below had the power to order the defendant's attorney to restore and pay over the money to its clerk. He had received it in his capacity as attorney in an action in that court, and was given an opportunity to show that he had paid over the money, or a part of it, to his client, which he failed to do; it must, therefore, be assumed that he retained the whole of it in his possession at the time the order was made. The mere fact that "he had accounted for it" while he kept it in his pocket, is not sufficient in this case. The order under which he obtained it was *ex parte*, and could not determine the title to it, nor in any manner affect such title, and in this respect differs from *Langley v. Warner* (3 N. Y. 327), when the money was collected and paid over under an execution based upon a judgment valid at the time.

In the *Matter of Wilmerdings v. Fowler*, (55 N. Y. 641), the authority of the court to grant an order similar to the one under review was not disputed, but it was sent back to the special term, in order that the appellant might show the very thing the court below in this case permitted him to do, but which he failed to show.

The order appealed from directs the payment of the

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money into court "to the end that such application may be made in respect thereto, as the parties interested may be advised." Of such application the appellant should have notice, and then all his rights, if any, can be fully protected. It is not necessary at this time to pass upon any of them further than we have already done.

The order should be affirmed, with costs.

LARREMORE, P. J., and ALLEN, J., concurred.

In re REUBEN W. HOWES, RESPONDENT.
GEORGE W. FOWLER, APPELLANT.

SUPREME COURT, FIRST DEPARTMENT, GENERAL
TERM, JANUARY, 1886.

§§ 2200, *et seq.*, 2204, 2208.

Discharge from imprisonment.—When application for denied.

Where on an application by an insolvent debtor imprisoned under an execution for his discharge from imprisonment, it appears that just prior to the making of an assignment for the benefit of creditors by a firm of which he was a member, he permitted his wife to withdraw all the ready money of the firm on account of an indebtedness due her from the firm, and had caused the transfer of an indebtedness of \$1,700 due the firm from his daughter to his wife's credit balance in such manner as to extinguish the debt, and that the day of the assignment he collected \$596.11 of the firm's money, and appropriated it to his own use.—*Held*, that the judgment debtor's proceedings had not been just and fair*; that the statement in his affidavit made on the application for discharge that he had not in any manner disposed of his property with a view to the future benefit of himself or his family, or with an intent to injure or defraud any of his creditors, was not true, and that an order granting the application should be reversed, and the application denied.

In re Brady (8 *Hun*, 437) followed.
(Decided, January 8, 1886.)

* See *In re* Lowell, 8 N. Y. Civ. Pro. 5; *In re* Caamano, 8 *Id.* 29.

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Appeal by George W. Fowler, a judgment creditor, from an order, discharging the respondent, Reuben W. Howes, from imprisonment under an execution.

The appellant recovered a judgment against the respondent and his two former partners in an action for the conversion of \$2,000 deposited by the appellant with said firm. Execution was issued against the property of such judgment debtors and returned unsatisfied, and thereafter an execution against the person of this respondent was issued, under which he was arrested. The respondent's two partners were released from imprisonment by appellant—the one, because, as the appellant states, he “considered that he was not morally culpable,” and the other “upon the payment of a nominal sum for reasons similar, but not so satisfactory.”

The respondent made an application at special term for his discharge from imprisonment under section 2200 *et seq.* of the *Code of Civil Procedure*, which was granted, and this appeal was taken from the order thereupon entered.

Other facts are stated in the opinion.

Albert A. Abbott (*Abbott Bros.*, attorneys) for judgment creditor, appellant.

The debtor cannot have his discharge if his proceedings are not “just and fair.” They cannot be “just and fair,” if the affidavit required by law as a part of the proceedings is false and untrue. *Code of Civil Procedure*, § 2204; *In re Brady* (69 N. Y. 215); *Gaul v. Clark* (1 N. Y. *Weekly Dig.* 209); *In re Watson* (2 *E. D. Smith*, 429); *In re Andriot* (2 *Daly*, 28.)

R. H. Underhill, for judgment debtor, respondent.

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To prevent the discharge of the debtor, one of three things must be shown by the opposing creditor:

(1). That the debtor has disposed of or made over property for "the *future* benefit" of himself or his family . . . It has been held that "future" in the statute means a time *after* the presentation of the petition by the debtor. *In re Brady*, 69 N. Y. 215.

(2). That he has made such disposition of his property "*with intent* to injure or defraud" some of his creditors. Admitting for the sake of argument that some of the creditors were injured, or even defrauded in law, unless the debtor was aware of the character of the act and knew it to be illegal, and he intended to deprive the opposing creditor of his rights to share in the sum in question, it cannot be said that it was with intent, etc., which is necessary to prevent the discharge. The burden of proof in this, as well as in all other matters urged in opposition to the discharge, is upon the creditor. *Matter of Benson* 10 *Daly*, 166. It will be observed that it is not every fraud which the prisoner may have committed and for which he has been arrested, that will prevent his discharge under this statute. The Legislature might have so provided, but they did not; they have confined the prohibitory acts to the two dispositions of property above stated. One of the common cases of fraud is that of obtaining money by false representations, and yet this does not prevent the prisoner's discharge under this statute. *Matter of Pearce*, 29 *Hun*, 270. Nor does the conversion by an agent to his own use of money received in a fiduciary capacity prevent his discharge. *Suydam v. Belknap*, 20 *Hun*, 87. It is said in *Develin v. Cooper*, 84 N. Y. 410, 418, that "fraud which renders the discharge void, is one done in the proceedings to obtain the discharge, and not one done before and in which the making of the debt was involved," or

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(3). That his proceedings have not been just and fair ; or, in other words, the affidavits which the debtor is required to make at the time of presenting his petition is not true ; the proceedings being those which he must set forth in such affidavit, and do not include any prior transactions not embraced in it. *In re of Fowler*, 8 *Daly*, 548 ; *People v. White*, 14 *How. Pr.* 498, 502 ; *In re Brady*, 8 *Hun*, 437, 439.

As the ground for the arrest cannot be the ground on which the court can adjudge the proceedings not just and fair, unless such ground was the disposal of the property with intent to defraud his creditors (*People v. White*, *supra* ; *Devlin v. Cooper*, *supra*), it follows that no other illegal act or even fraud of the debtors, which he is not called upon by his affidavit to show, was not done, is sufficient under the statute to prevent his discharge . . .

The policy and the spirit of the insolvent laws are to discharge the debtor from imprisonment on giving up honest all his property to his creditors. It is the duty of the court to discharge him, however dishonest or improperly his conduct may have been, unless it brings him within the prohibition of the statute. *People v. White*, *supra* ; and see *Suydam v. Belknap*, 20 *Hun*, 87.

DAVIS, P. J.—The petitioner was a member of the firm of Howes & Co. On the 3d day of March, 1884, that firm was largely insolvent and made an assignment for the benefit of its creditors. On the morning of the same day, and a little while before the assignment was made, one Albert A. Drake owed the firm the sum of \$596.11, and the petitioner, with the design to get possession of that money, with the intention of using it for his own purposes and his family expenses, called on Drake and received and collected his check for that sum, putting

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it into his own pocket. He was at that moment a very heavy debtor to the firm.

He delivered none of the money collected to the assignee, and, soon after, verified an inventory of the firm assets, making no reference to the cash which he had on that morning collected from Drake and kept for his own personal use. There was a conflict in the affidavits as to whether the money was received before or after the assignment.

But probably it was just prior, as above stated. But that does not seem to be material, as the petitioner had authority to collect the same for the firm and had the money in his pocket when he executed the assignment.

The Code, section 2204, requires that a debtor who makes application for discharge from imprisonment under its provisions shall, among other things, make oath as follows: "That I have not, at any time or in any manner whatsoever, disposed of or made over any part of my property, not exempt by express provision of the law from levy and sale by virtue of an execution, for the future benefit of myself or my family, or disposed of or made over any part of my property, with intent to injure or defraud my creditors."

It was not pretended that the \$596.11 received from Drake was exempt from execution, and the transaction bears no other construction than that the petitioner, in obtaining the money and applying it to his own use, intended to withhold and conceal property of the firm which should have been delivered under the assignment. This transaction is materially colored also by the conduct of the petitioner just before the making of the assignment in respect to the heavy indebtedness of the firm to his wife. He was himself the largest debtor, and she was permitted to withdraw all the ready cash of the firm upon the brink of its failure, and by the direction of the petitioner an al-

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teration was made in the books of the firm just before its failure, which transferred an indebtedness of \$1,700 by his daughter to the firm to his wife's credit balance in such manner as to extinguish the debt. These things of themselves were not sufficient to prevent the petitioner's discharge, but they may certainly be considered in connection with the transaction in relation to the \$596.11, received from Drake and kept by the petitioner, as showing his intent in the transaction.

In the Matter of Brady (8 *Hun*, 437), this Court held that it is enough to defeat the discharge to show that the petitioner had disposed of some of his property, with intent to defraud his creditors, of whom the opposing creditor was one. It appears in this case that the opposing creditor was at the time of the assignment a creditor of the firm by reason of a conversion of his property, for which the defendant obtained a judgment, and upon which execution was issued against the body of the petitioner. The Court of Appeals confirmed that construction of the statute (Matter of Brady, 69 *N. Y.* 215).

We think, therefore, that the proceedings of the petitioner were shown, within the meaning of the statute, not to have been just and fair, and that the statement in the affidavit that he had not at any time or in any manner disposed of his property with a view to the future benefit of himself or his family, or with an intent to injure and defraud any of his creditors, was not true.

The order should be reversed and an order made denying the discharge of the petitioner, with \$10 costs of the appeal and disbursements.

BRADY and DANIELS, JJ., concur.

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SORIA, RESPONDENT, v. DAVIDSON, AS SHERIFF,
ETC., APPELLANT.SUPERIOR COURT OF THE CITY OF NEW YORK;
GENERAL TERM, JANUARY, 1886.

§§ 1186, 1187, 1189, 1730.

Verdict—General, in action of replevin—What determined by—Form of Judgment.

In an action to recover a chattel the jury may render a general verdict. A general verdict settles in favor of the prevailing party every question of fact.

Where in an action to recover a chattel one of the questions in dispute was as to the quantity of goods taken by the defendant, and the verdict of the jury was as follows: "The jury say they find a verdict for the plaintiff, and assess the value of the goods when taken, at the sum of \$3,090, and the depreciation of the goods since taken, at the sum of \$650.50,—*Held*, that the verdict was general; that the finding of the jury in the plaintiff's favor for the goods taken must be construed to be the quantity claimed by the plaintiff, and the value assessed upon that basis; that if there was any doubt upon the subject a point should have been made when the verdict was received, and when it was not too late to have it corrected.

In such a case it is no objection to the judgment that it is in the alternative, *i. e.*, that in the event the goods cannot be recovered and delivered, that the plaintiff recover his damages.

(*Decided January 28th, 1886.*)

Appeal by defendant from order denying motion to set aside judgment, or to direct the clerk of the court to correct the same and make it conform to the verdict of the jury.

The action was brought to recover the possession of 66,400 cigars and \$500 in money alleged to have been wrongfully taken from the plaintiff by the defendant.

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On the trial the court ruled that the \$500 could not be recovered in this action, and that part of plaintiff's claim was therefore abandoned. There was also a contest as to the quantity of cigars taken by the defendant, he asserting that he took but 44,300. The verdict of the jury was rendered verbally, and the entry thereof in the minutes was as follows :

“ The court charged the jury, who say they find a verdict for plaintiff, and assess the value of the goods when taken, at the sum of \$3,090, and the depreciation of the goods since taken, at the sum of \$650.50.”

On this verdict a judgment was entered which, omitting title and signature, reads as follows :

“ This action having come to be tried in its regular order before his Honor, John Sedgwick, Chief Judge of this court, and a jury, the 16th day of December, 1884, and continued to and including the 18th day of December, 1884, and the verdict of the jury having been entered therein, whereby they found for the plaintiff and assessed the value of the property described in the complaint, exclusive of the \$500 in money, therein mentioned, at the time of the taking thereof by defendant, to be \$3,090.00, and also found that the said property had depreciated in value since it was taken by defendant, the amount of \$650.50, and the costs having been adjusted by the clerk on notice at \$275.78,

“ Now, on motion of Henry L. Vilas, attorney for the plaintiff, it is hereby adjudged that the plaintiff Cayetano Soria recover possession of all the personal property described in the complaint, except said five hundred dollars in money, and also the sum of \$650.50 damages for the detention thereof, or in case a return and delivery thereof can not be had, then that said plaintiff recover of the said defendant the sum of \$3,090.00, the value of the said

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property at the time of the taking of the said property, and also the sum of \$275.79 for his costs and disbursements of this action."

W. Bourke Cockran, for defendant-appellant.

Section 1189 of the Code of Civil Procedure provides that the clerk must make an entry in his minutes of the verdict, and must, on the application of the successful party, "enter judgment in conformity to the verdict, unless a different direction is given by the court, or it is otherwise specially prescribed by law." No directions were given in this case, by the court, and there is no provision of law which prescribes that the judgment shall be entered otherwise than in conformity to the verdict.

. . . . The jury did not find that the plaintiff was entitled to the property described in the complaint; in fact, there is no mention whatever in the verdict of the property described in the complaint. There is no finding to sustain that portion of the judgment, which directs that the plaintiff recover possession of all the personal property described in the complaint, except \$500 in money. . . . There is no finding to sustain that portion of the judgment, which directs that in case a return and delivery cannot be had, then that said plaintiff recover of said defendant the sum of \$3,090.00, the value of said property at the time of taking. . . . : The verdict was an indefinite, improper and erroneous one, and the plaintiff's attorney should have requested the court to send the jury back to correct it, had he desired to have it in such a form that a proper and legal judgment could have been entered upon it. A verdict is of no force until received, and the court, on the application of the plaintiff's attorney, could have sent the jury back to reconsider their verdict before receiving and recording it, where it was clearly apparent that the verdict was a mistaken or an improper one. *Hegeman v.*

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Cantrell, 40 *N. Y. Supr.* (8 *J. & S.*), 273. But after the verdict was received and recorded, and the jury discharged, no power existed in the court to change it. . . . The unwarranted act of the plaintiff's attorney in turning what should have been an absolute judgment into an alternate one, will have the effect, unless corrected by this court, of most seriously prejudicing the defendant's appeal. Had the judgment been entered as the verdict was received, in an absolute form, it would have been reversed on appeal. *Dwight v. Enos*, 9 *N. Y.*, 470; *McLean v. Cole*, 13 *Hun*, 300. . . . The contention of the plaintiff's counsel, that this is a general verdict, is manifestly without foundation.

Jacob Fromme (*H. L. Vilas*, attorney), for plaintiff-respondent.

The verdict was the ordinary one in action to recover a chattel (*Code of Civil Procedure*, §§ 1186, 1187.) It was a general verdict. The jury find "a verdict for the plaintiff and assess the value of the goods, when taken, at the sum of \$3,090.00, and the depreciation of the goods since taken, at the sum of \$650.50. This was in accordance with the settled law and practice. *Young v. Willet*, 8 *Bosw.* 486; *Phillip v. Melville*, 10 *Hun*, 211. This showed that the jury found in favor of the plaintiff for all the goods. A general verdict settles in favor of the prevailing party every litigated question of fact. *Rhodes v. Bunts*, 21 *Wend.* 19; *Wolfe v. Godhue Fire Ins. Co.*, 43 *Barb.* 400; *Murphy v. Lippe*, 35 *N. Y. Supr.* 3 (*J. & S.*), 542.

BY THE COURT (FREEDMAN AND VAN VORST, JJ.)—The verdict was recovered in an action for the claim and delivery of personal property. It was general, and in these words: "The jury say they find a verdict for the plaintiff, and assess the value of the

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goods when taken at the sum of \$3,090, the depreciation of the goods since taken, at the sum of \$650.50."

No objection was made at the time by either party to the form of the verdict.

Complaint is now, however, made on behalf of the defendant as to the form of the judgment entered up. It recites that the jury find for the plaintiff that he is entitled to the property described in the complaint. The finding, as already stated, is general, and such finding is allowed in an action of this character (*Code of Civil Procedure*, § 1187). The verdict has none of the qualities of a special verdict. It is, in form, correct. *Young v. Willet*, 8 *Bosw.* 486; *Philips v. Melville*, 10 *Hun*, 211.

A general verdict settles in favor of the prevailing party every question of fact. The question as to the quantity of goods taken by the defendant was in dispute. The plaintiff offered evidence showing that the complaint truly stated the amount. The defendant offered evidence to the contrary. The finding of the jury in the plaintiff's favor for the goods taken must be construed to be the quantity claimed by the plaintiff and the value assessed upon that basis.

If there was any doubt upon the subject, a point should have been made when the verdict was received, and when it was not too late to have it corrected. Every presumption is in favor of the regularity of the verdict, and that it found in the plaintiff's favor the amount of goods claimed by him, as well as its value. It is no objection to the judgment that it is in the alternative—that is, that in the event the goods cannot be recovered and delivered, that the plaintiff recover his damages (*Code of Civil Procedure*, § 1730.)

The order appealed from is affirmed, with costs and disbursements.

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WEEKS, AS EXECUTOR AND TRUSTEE, ETC., OF
JACOB WEEKS, DECEASED, RESPONDENT, v.
CORNWELL, AS EXECUTOR, ETC., *et al.* IM-
PLEADED, ETC., APPELLANTS.

SUPREME COURT, FIRST DEPARTMENT, GENERAL
TERM, JANUARY, 1886.

§§ 484, 488.

*Parties.—Who may be made, to action in equity.—Joinder of causes of
action.—Accounting of executor and trustee.*

Where a complaint contained twenty-one sub-divisions, and the second division commenced with the words, "For a second cause of action the plaintiff avers, sets forth and alleges as follows," and each of the other divisions, except the first and eighteenth, were preceded in the same manner, but with the appropriate change in the number,—*Held*, that a presumption arose out of the manner in which the different sub-divisions of the complaint had been inserted in it, that it was intended that the allegations contained in each sub-division should form a separate and distinct cause of action, [¹] but that this would not be conclusive against the plaintiff, if the complaint could be construed to contain but one cause of action [²].

Although all persons in any way interested may very well be made parties to an action in equity, even though their interest be entirely remote or contingent, and the law favors an action in that form [³], and for the purpose of settling disputed controversies or rights, permits them to be included in one litigation where they arise out of the same subject-matter [³], the interest to the protected, or to be assailed in the action should be a common one, and the plaintiffs identified in interest in maintaining the action and obtaining the relief it may be its object to secure [³], and a court of equity will not generally take cognizance of distinct and separate claims of different persons in one suit though standing in the same relative situation [⁴].

Berkley v. Presgrave (1 *East* [*Eng. K. B.*] 220, approved [⁵].

Where trusts were created by a will, in favor of a large number of different individuals, by giving to the executors thereof certain real property, for the benefit separately of each one of the *cestuis que*

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trusts or beneficiaries, the property devoted to the creation of each trust being separate and distinct from all the others, and in each instance the executors were directed to collect the rents, etc., thereof during the life of the respective beneficiaries, and, after paying for all repairs, etc., to pay the remainder as and when collected, to the beneficiary, and each of the trusts were to continue during the lifetime of the beneficiaries and no longer, and at his or her death the property devoted to each trust was devised in fee to the persons designated in the concluding paragraph of each division of the will creating a trust, and each of the trusts were to be administered separately,—*Held*, that each trust was as separate and distinct as though it had been created by a different instrument from that creating each of the others, [^{6, 8}] that the executors, accordingly, were bound to account to the beneficiary in each trust for its administration, and were under no obligation or duty to account to either of the other beneficiaries in trust, or to either of the persons entitled to the trust property in remainder; [^{7, 9}] that the executors could not join in one complaint several causes of action for an accounting and settlement of the different trusts; [^{8, 10, 18}] that the causes of action were obnoxious to the objection that they did not affect all the parties to the action, but each cause of action affected only the particular beneficiary and remaindermen named in it. [^{11, 16}]

In such a case,—*Held*, that allegations showing that the several trusts had been executed by the executors, and allegations setting out a cause of action relating to the residuary estate, including no part devoted to the trusts, and allegations setting up a cause of action relating to the disposition of property bequeathed to the widow, and not entering into the trust, and in the determination of which neither of the beneficiaries in either trusts was at all directly interested, in no way relieved the complaint from the objection that it improperly joined distinct causes of action; [¹²] that as to this second cause of action the fact that the *cestuis que* trusts and remaindermen in the several trusts might be interested, if the personal estate proved to be deficient, and the real estate should be liable to discharge other obligations existing against the estate, would not make them proper parties to an action thereon in the absence of an averment of a prospective deficiency in the personal estate to meet such obligations. [¹³]

Where in such a case the will provided that the executors should receive “the sum of \$1,200 annually in lieu of all other commissions or compensation allowed by law,” and the plaintiff claimed that he should be compensated by commissions or otherwise more liberally than this provision of the will directed,—*Held*, that if he should prove to be right in this demand, his compensation may be derived from the personal estate, which would be the primary source of its payment, except what he may be further entitled to for the administration of the respective trusts created by the will, and that for those services he should have retained his compensation out of the rents and profits col-

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lected by him ; [14] that as he had not done that, his compensation for each trust must be limited to the obligation of the beneficiary or his or her personal representative or next of kin ; [14] that such compensation should be apportioned and graded by the services required in, and bestowed upon the management of each of the trusts separately from the others ; [15, 16] that so far as the executor might be able to maintain his claim for compensation or commissions for the general management of the estate, the beneficiaries in the trusts would without doubt be interest, but that that interest and the settlement of accounts relating to it formed a cause of action by itself, not entitled, under the provisions of the Code of Civil Procedure, to be united in the same complaint with a cause of action for the settlement of the executor's accounts in the administration of either of the trusts.[17]

(Decided March 5, 1886.)

.Two appeals from judgments, overruling demurrers to the plaintiff's complaint.

The opinion states sufficient facts.

Flamen B. Candler (*Van Winkle, Candler & Jay*, attorneys), for Jacob Weeks, Cornwell and nine others, defendants-appellants.

Abner C. Thomas, for Georgiana Wood, and Maud Irene Wood, defendants-appellants.

A. H. Stoiber (*Van Schaick, Gillender & Stoiber*, attorneys), for plaintiff-respondent.

DANIELS, J.—The plaintiff, as one of the executors of the estate of Jacob Weeks, commenced this action to settle his accounts as executor, and to obtain the determination of the court upon certain portions of the will drawn in question by him, and its judgment as to his compensation as executor and trustee of the estate. Ten of the defendants joined in the demurrer to ten different sub-divisions of the complaint in form setting forth separate causes of action. These divisions extend from the fifth to the fourteenth alleged causes of action, both

inclusive. The other two appealing defendants by their demurrer, demurred to each division of the complaint, being twenty-one in number. The objections taken by the ten demurring defendants to each of such divisions of the complaint were the same, and they are that neither of the divisions demurred to state facts sufficient to constitute a cause of action against either of these defendants, and that such causes of action are each improperly united with other causes of action in the complaint, inasmuch as neither affects the rights of all the parties to the action, or either or any of the ten defendants demurring, but affects the rights of the persons, only, mentioned in the respective causes of action. The demurrer of the other two defendants is not unlike that interposed by the ten defendants, except that it includes all the divisions of the complaint.

[¹] A presumption arises out of the manner in which the different divisions of the complaint have been inserted in it, that it was intended that the allegations contained in each division should form a distinct and separate cause of action. For with the exception of the first and eighteenth, each of the divisions of the complaint is introduced with the statement of it as another cause of action. The second division of the complaint commences with the words: "For a second cause of action the plaintiff avers, sets forth and alleges as follows," and each of the others which have been mentioned are preceded

[²] in the same manner, but with the appropriate change in the number. This, however, would not be conclusive against the plaintiff if the complaint could be so construed as still to contain but one cause of action (*Hillman v. Hillman*, 14 *How. Pr.*, 456). For if it contained but one cause of action, and that was, as the complaint was designed to be, in equity, then all persons in any way

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[³] interested might very well be made parties to the action, even though their interests might be entirely remote or contingent. For the law favors an action in that form. For the purpose of settling disputed controversies or rights, it permits them to be included in one litigation, where they arise out of the same subject matter. This subject was elaborately considered in *Brinkerhoff v. Brown*, (6 *Johns. Ch.*, 139), where the authorities were discussed and cited, and it was there determined that where there was a common interest to be maintained in equity, either in favor of the plaintiffs or against the defendants, all persons in any manner connected with that interest could regularly be brought before the court, for its determination, and the same rule has been generally stated in section 539 of *Story's Equity Pleadings*, and also in *Garner v. Thorn*, 56 *How. Pr.* 452. But this

rule requires that the interest to be protected, or to [⁴] be assailed, in the action, shall be a common one, and that the plaintiffs are identified in interest in maintaining the action and obtaining the relief it may be its object to secure. But at the same time it has been held, and reasonably and properly so, that a court of equity will not generally "take cognizance of distinct and separate claims of different persons in one suit though standing in the same relative situation."

[⁵] *Berkley v. Presgrave*, 1 *East (Eng. K. B.)* 220, 226-7.

There must be a common interest centering in the point in issue. *Ward v. Duke, etc.*, 2 *Anstruther, (Eng. Excr.)* 459, 477; *Raynor v. Julian*, 2 *Dickens, (Eng. Chy.)*, 677. This rule has been further stated to be that "a party cannot be brought as a defendant upon a record with a large portion of which, and of the case made by which, he has no connection whatever. (*Story's Equity Pleadings*, § 530.) And these authorities and the rule which they support do not seem to promote

the maintenance of the plaintiff's action in the manner in which it has been disclosed and set forth in the complaint.

By the testator's will he created trusts in favor of a large number of different individuals. Each of these trusts were declared in the same form, and that was done by giving to the executors certain lots, or parcels of ground, for the benefit separately of each one of the *cestuis que* trusts, or beneficiaries. The property devoted to the creation of each of these trusts was separate and distinct from all the others. In this manner the testator divided and disposed of that part of his estate intended to be devised in trust for the benefit of these beneficiaries. And in each instance the direction given to the executors was the same, and that was to collect the rents, profits and income thereof during the life of the respective beneficiaries, "and after expending therefrom such amounts as they may deem necessary to keep all said premises in good order and repair, and properly insured against loss and damage by fire, to pay the remainder of such rents, as and when collected, to" the beneficiary. Each of these trusts was to continue during the life of the beneficiary, and no longer. At his, or her, decease the property devoted to each trust was devised in fee to the persons named, or designated in the concluding paragraphs of the will, added to the creation of each particular trust. In the administration of these trusts the executors of the estate, of whom the plaintiff was the active one, were required to proceed separately for each one of the trusts. They were to collect the rents and profits of the property devoted to each trust for the benefit of its own beneficiary. And out of that, after defraying the necessary expenditures to keep the property of each trust in good order and repair and properly insured, the residue was made payable to the beneficiary.

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This was not changed by either of the other directions contained in the will, for what the executors were authorized and empowered to do in their management to the different trusts, was still separately and divisibly directed. By the twenty-seventh paragraph of the will they were authorized to rebuild the buildings upon any of the lots of ground conveyed to them in trust, when the building should be partially injured, or wholly destroyed, by fire. And to do that they were invested with the power to mortgage the parcel or parcels of lands upon which the buildings should be situated, which was made a charge upon such parcels. By the twenty-eighth paragraph of the will they were also authorized to erect buildings upon any of the vacant lots conveyed to them in trust, upon the request in writing of the person or persons, or a majority of them, entitled to take under the provisions of the trust so created, and to raise money by way of mortgage upon the parcel or parcels of land upon which the buildings were to be placed, which were charged upon such parcels of land respectively. And by the thirty-first paragraph of the will the executors were directed to pay all annual taxes and all assessments upon the property devised to them in trust out of the income thereof respectively. They were also, by the thirtieth paragraph of the will, directed generally in the first instance to pay all taxes, assessments, mortgages or incumbrances against the testator's property at the time of his decease. These directions contained in the will, for building, repairing and rebuilding, and the payment of annual taxes and all assessments, promote and preserve the general scheme of the will, by which each of the trusts was made separate and divisible from all the others, and created by the devise of different parcels of property. For whatever was to be done, either by way of repairs or insurance, or

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building or rebuilding, or by the payment of taxes or assessments, the property itself which should be improved, or for which the taxes and assessments should be paid, was made to bear the burden alone. It could in no event be imposed upon other or different property mentioned in other portions of the will. Each trust was as separate and distinct as though it had been created by a different instrument from that creating each of the others. And the duties, power and authority of the executors was equally as distinct and separate in the administration of each one of these trusts. Neither in any manner ran into, or was intermingled with the other, and from the time the executors commenced their administration their obligations were to the respective beneficiaries of each trust as distinct and separate, individually, and not to the beneficiaries jointly. The executors, accordingly, were bound to account to the beneficiary in each trust for its administration, and as to such trust they were under no obligation or duty to account to either of the other beneficiaries in trust, or to either of the persons entitled to the trust property in remainder. It is true that these trusts were all created by the testator's will, but as they were separate and distinct, and declared and intended so to be, there was no joint or common interest in the beneficiaries, or arising out of their administration, which would authorize the executors in the settlement of their accounts to bring these different trusts into the same suit. For the accounting and settlement must be perfectly distinct and divisible as to each. That was a separate cause of action affecting an entirely different party from that to be affected upon the settlement of each of the others, and they could not regularly be brought into and made a part of the same complaint. They were separate causes of action as the plaintiff correctly alleged

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them to be in the complaint, and they were not allowed to be joined in the same complaint under section 484 of the Code of Civil Procedure. If the least colorable ground existed for joining them it would be that included within the ninth sub-division of this section, allowing claims arising out of the same transaction or transactions connected with the same subject matter, to be joined in the same complaint. But the claims of the plaintiff as the active executor to an accounting have not arisen out of the same transaction or transactions, but they have arisen out of as many different transactions as there were distinct trusts created by the testator's will. When different claims or causes of action are allowed to be joined they are also required, when not otherwise prescribed by law, to affect all the parties to the action, and

as no provision can be invoked making an exception [11] in favor of this action, these causes of action are obnoxious to the objection that they do not affect all the parties to the action, but each cause of action affects only the particular beneficiary named in it and his personal representatives, or possibly next of kin. When, in violation of the provisions contained in this section, the causes of action set forth in the complaint are improperly united, it may be made the subject of demurrer, as this complaint has been, under the authority of sub-division

7, section 488 of the Code of Civil Procedure.

[12] The allegations made in the other divisions of the complaint, extending from the eighteenth to and including the twenty-first, in no way relieve the complaint from the objection that it has improperly joined distinct causes of action. Those contained in the eighteenth paragraph are no further important than that they show these several trusts, as they have there been designated, to have been executed by the executors. Those contained in the nineteenth division of the complaint re-

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late to the rest and residue of the testator's estate, including no part of that devoted to the creation of the trusts which have already been considered. The allegations of the twentieth division are directed to the disposition of property bequeathed to the widow, and not entering into either of the trusts, but relating especially to the disposition of a municipal bond and a bond and mortgage executed by Mary Weeks and Nathaniel Weeks to the testator to secure the payment of the sum of fifteen thousand dollars.

Neither of the beneficiaries in either trust is at all directly interested in the determination of this cause of action. Certainly the parties appealing from the judgment have no such interest, for if these securities belonged to the widow at the time of her decease, they passed under her will and vested in her legatee. In no event did the other parties to the action have the least interest in the determination of this part of the controversy. The claim has been made that they might [13] be interested if the personal estate proved to be deficient, and the real estate should be liable to be resorted to to discharge other obligations existing against this estate. But no prospective deficiency in the personal estate to meet such obligations has been alleged, and without some averment in that direction a deficiency of personal property cannot be presumed.

By the last division of the complaint the executor presents his claim for compensation for his own services. In the thirty-second clause of the will each acting executor was given "the sum of twelve hundred dollars annually in lieu of all other commissions or compensation allowed by law." That has not been reserved by the executors; neither have they received any commissions beyond those retained for moneys collected out of the property mentioned in the twenty-fourth paragraph

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of the will, and the demand made by the plaintiff is that he shall be compensated by commissions or otherwise, more liberally than this provision of the will has directed that to be done. But if he shall prove to [14] be right in this demand his compensation may be derived from the personal estate, which would be the primary source of its payment, except what he may be further entitled to, for the administration of the respective trusts created by the will. And for those services the executor should have retained his compensation out of the rents and profits collected by him. But as he has not done that, his right to compensation for each trust must be limited to the obligations of the beneficiary, or his or her personal representatives or next of kin. And that compensation is to be apportioned and graded by the services required in, and bestowed upon, [15] the management of each of the trusts separately from the other. If, therefore, it should be determined that the executor was entitled to more than has been mentioned in the will, the determination would not define the extent of his rights arising out of either one of the trust estates. It is very probable that the twelve hundred dollars a year mentioned in the thirty-second paragraph of the will should not be held to include the administration of these trusts, and as to each of them the executor shall be lawfully compensated for his services. But that right to compensation creates no common obligation against the beneficiaries in the [16] trusts, but must be apportioned to each of the trusts, and regulated and controlled entirely by the services of the trustee as to such trusts respectively, and separately from each of the others. So far as the executor may be able to maintain his claims for compensation [17] or commissions, for the general management of the estate, the beneficiaries in the trusts will, with-

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out doubt, be interested. But that interest, and the settlement of the accounts relating to it, form a cause of action by themselves, not entitled under the provisions of the Code to be united in the same complaint with a cause of action for the settlement of the executor's accounts in the administration of either of the trusts. The latter are distinct from all the other causes of action set forth in the complaint, and incapable of being legally united with either of them.

From this examination of the complaint it is clear that, so far as different trusts are set forth, the [18] right and obligation of the plaintiff to account for his management in it is separate and legally divisible from all the others, that the accounting as to each trust must be exclusively between himself and the beneficiary in that trust, or his personal representatives when he may become deceased. And these different causes of action do not affect all the parties to the suit, and cannot, under the authority of the law, be alleged and set forth in the complaint. This point has been raised and distinctly presented by each of the demurrers, and as it is required to be sustained, the judgment from which the appeal has been taken should be reversed, and a judgment entered sustaining the demurrers of the appealing defendants to the complaint, with costs, with leave to the plaintiff to amend in twenty days on payment of the costs of the demurrers and of these appeals.

DAVIS, P. J., and BRADY, J., concurred.

Clark v. Blumenthal.

CLARK, APPELLANT, v. BLUMENTHAL ET AL.,
RESPONDENTS.

SUPERIOR COURT OF THE CITY OF NEW YORK, GEN-
ERAL TERM, DECEMBER, 1885.

§§ 968, 969.

Trial at special term or before jury.—Test of.

The test of the kind of trial to which a plaintiff is entitled is not the legal conclusion from the facts averred in the complaint, but it is the nature of the demand therein. If upon any supposed state of facts set out in the complaint the plaintiff claims he has a right to equitable relief, he has a right to present the claim to the special term, and is not forced in the first instance to a trial by jury, and this although it appears that the complaint is clearly insufficient to maintain the demand for equitable relief.

Where a complaint asked that an agreement for the sale of real property be reformed by inserting the name of the defendant "B" as a party thereto in place of the defendant "W" and for judgment against said "B" for damages for the breach of the contract,—*Held*, that the plaintiff had a right to have the action tried primarily at special term, and it was improperly stricken from the special term calendar.

(Decided, December 7, 1885.)

Appeal by plaintiff from order striking the case from the calendar of issues of facts at special term, and directing the issues to be tried before a jury.

The complaint contained, among others, the following averments: that the defendant, Weinberg, held the legal title of certain real estate, but "solely as the repository or trustee of the defendant, Blumenthal, and without any personal pecuniary interest therein whatever;" and that at all times referred to "the said Blumenthal received and appropriated to his own use the en-

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tire rents and profits thereof to a large amount ; ” that defendant, Blumenthal, negotiated and made an agreement with the plaintiff “to convey said real estate to the latter, and received from him \$1,000 on account of the purchase money ; ” that “in pursuance of such agreement the plaintiff and defendant executed each to the other an instrument under seal ; ” that this instrument, on its face, was made between the defendant, Weinberg, and the plaintiff, and was for the sale by the former and purchase by the latter of the real estate specified, and was executed by Jacob B. Weinberg (the defendant) under his seal, “per Joseph Blumenthal,” the other defendant ; that at the time of the execution of the instrument defendant, Blumenthal, represented to plaintiff that Weinberg (defendant) was “the true, lawful and equitable owner of the said premises ; ” that before the day fixed for the performance of the agreement the defendant, Blumenthal, “sold and procured defendant, Weinberg, to convey said premises to one Goldstein ; ” and that defendant, Blumenthal, received and appropriated to his own use \$18,000, paid by Goldstein to him, said Blumenthal, as and for the consideration of the sale ; that the plaintiff had sustained damages in the sum of \$19,000, in the manner particularly alleged in the complaint, etc. “Wherefore the plaintiff demands judgment that the before-mentioned agreement be reformed, inserting the name of Joseph Blumenthal, as party of the first part thereto, in place of the defendant, Jacob B. Weinberg, or that the defendant, Blumenthal, be adjudged to be the true party in interest and individually affected by the said agreement and the covenants of the party of the first part therein specified ; that the plaintiff recover from the said Joseph Blumenthal the aforesaid sum of \$19,000, with interest.”

After answers were served, the plaintiff placed the

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cause upon the special term calendar for the trial of issues of fact. Upon defendant's motion, the cause was stricken from that calendar, and the order then made directed that the issues be tried before a jury.

The present appeal is by plaintiff from this order.

T. M. Tyng, for plaintiff-appellant.

Joseph Ulman and *Simpson Wolf*, for defendants-respondents.

SEDGWICK, Ch. J.—[After stating facts] Section 968 of the Code of Civil Procedure, that in "an action in which the complaint demands judgment for a sum of money only," an issue of fact must be tried by a jury, and also in actions "of ejectment, for dower, for waste, for a nuisance, or to recover a chattel." Section 969 is, "an issue of fact not specified in the last section . . . must be tried by the court." It is at once perceived that the test of the kind of trial is not the legal conclusion from the facts averred in the complaint, but it is the nature of the demand. If, upon any supposed state of facts set out in the complaint, the plaintiff claims he has a right to equitable relief, he has the right to present the claim for adjudication to the court at special term, and is not forced in the first instance to a trial by a jury. He has a right to the judgment of the court, and if it be unfavorable to him, then to the advantages of appeal from the judgment. Even if it be perceived that the complaint is clearly insufficient to maintain his demand for equitable relief, he still has the right to have that determined by the special term.

It is suggested in this case that the real substantial demand is for a judgment for a sum of money only. So far as defendant, Blumenthal, is concerned, it will be necessary for the plaintiff to have the contract reformed

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by making Blumenthal a party to it, before the claim for damages can be considered against him, and, therefore, the money demand is secondary to the primary demand for reformation. As to Weinberg, the complaint makes no personal demand, other than such as may be connected with his right to resist the placing of Blumenthal in the contract in his stead. I am of opinion that the plaintiffs had a right to have the issue tried, at least primarily, at special term.

It was asserted that the order appealed from was made at special term after the case had been called for trial. The printed papers disclose an order made without reference to the case actually being on trial. The court, therefore, had the power to impose cost of motion, without any controversy as to what would have been its power if the order were made in the course of the trial.

The order appealed from should be reversed, with \$10 single costs, and the motion below denied, with \$10 single costs, and the order entered should provide that the case be placed on the special term calendar for trial.

VAN VORST and FREEDMAN, JJ., concurred.

HOSLEY v. COLERICK.

SUPREME COURT, FOURTH DEPARTMENT, CATTARAUGUS COUNTY, SPECIAL TERM, JANUARY, 1886.

§ 3251.

Costs of motion for new trial on newly discovered evidence and on the ground of surprise.

A motion for a new trial on the ground of surprise and on newly discovered evidence is not "a motion for a new trial upon a case" within the meaning of the provision of section 3251 of the Code of Civil Procedure, granting the same costs "upon a motion for a new trial upon a case. . . as upon an appeal" to the general term of the supreme

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court, etc., and the only costs that can be awarded on such a motion, are motion costs. Accordingly *Held*, where the plaintiff moved for a new trial on the ground of surprise and on newly discovered evidence, and the motion was denied, that the defendant, although a case was actually made and settled, and used on the motion, was not entitled to tax \$20 costs before argument, \$40 for argument, and \$10 for making and serving amendments to case.

Warner v. Western Trans. Co. (5 Robt. 490), not followed.
(Decided, January 4, 1886).

Motion by defendant for a new taxation of costs.

The defendant seeks by this motion to have the clerk retax his costs and allow him the following items thereof, which he claims to be entitled to as the costs of a motion for a new trial, on the grounds of surprise and of newly discovered evidence, viz., costs before argument, \$20 ; for argument, \$40 ; making and serving amendments to case, \$10. A case was actually made and settled, and used on said motion for a new trial.

Other facts are stated in the opinion.

J. R. and M. B. Jewell, for defendant and motion.

Thomas Storrs, for plaintiff, opposed.

CHILDS, J.—This action was tried at the Cattaraugus circuit, and resulted in a verdict for the defendant.

Subsequently the plaintiff, upon a case and affidavits, moved at special term for a new trial “on the ground of surprise and newly discovered evidence.” This motion was denied with \$10 costs to the defendant. The defendant upon such decision entered an order denying motion for new trial, but containing no provision in respect to costs, and also entered judgment against the plaintiff for \$199.77 costs and disbursements, and immediately gave notice for a retaxation of such costs by and before the clerk of Cattaraugus county.

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The plaintiff, by his attorney, appeared before the clerk and objected to the taxation of the item of \$60 costs of motion for new trial, at special term, on a case, and to the item of \$10 for making amendments to case. Whereupon, the clerk disallowed said item, as well as the item \$3.40 witness' fees, which last item, it is now conceded, was properly disallowed. The defendant now insists that the item for costs of motion and making amendments to case on the motion for new trial were improperly disallowed by the clerk; that the defendant was entitled to tax and recover these costs as a matter of right under section 3251 of the Code of Civil Procedure, as and for the costs "upon a motion for a new trial upon a case."

It may be conceded that if the plaintiff's motion for new trial is to be regarded as a motion for a new trial *on a case*, that the defendant is correct in his contention, and the clerk should be reversed. *Guckenheimer v. Angervine*, 16 *Hun*, 453; *Wilcox v. Daggett*, 15 *N. Y. Weekly Dig.* 208; *Selover v. Wisner*, 37 *How. Pr.* 176; *Stitt v. Rowley*, 37 *Id.* 179.

But I am of the opinion that a motion for a new trial upon the ground of surprise and newly discovered evidence is not a motion *on a case* within the meaning of that term as employed in section 3251 of the Code.

It is doubtless the proper practice on such a motion to settle a case (Anonymous, 7 *Wend.* 331).*

But the whole office of the case on such a motion is to enable the court by an inspection of the same to as-

* In that case it was held that a motion for a new trial on the ground of newly discovered evidence would not be heard unless there was with the affidavits in support of the motion a case showing what transpired on the trial.

Section 998 of the Code of Civil Procedure provides that "it is not necessary to make a case for the purpose of moving for a new trial . . . upon an allegation of irregularity or surprise."

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certain whether the alleged newly discovered evidence as disclosed by the affidavits is cumulative. The motion is made upon the affidavits, no recourse being had to the case, except for the purpose indicated.

Whilst a motion for a new trial *on a case*, by the very terms employed imports a motion based wholly upon the record of the proceedings on the trial, and for some error in which a new trial is sought.

Again, if the claim of the defendant should be sustained, it would follow that a party succeeding upon a motion for a new trial on the ground of newly discovered evidence, would be entitled to tax against his adversary the costs of such motion \$60, and for making case \$20. This I do not understand to be allowable.

The granting of such a motion is regarded as a favor to the party, and the rule is to require such party to pay the costs of the former trial as a condition. *Comstock v. Dye*, 13 *Hun*, 113; *Simmons v. Fay*, 1 *E. D. Smith*, 107; *Bonyng v. Waterbury*, 12 *Hun*, 534, 537; *May v. Strauss*, 8 *Abb. N. C.* 274.

The conclusion which I have reached seems to be in accordance with the practice adopted by the court in disposing of motions of this character, as a reference to the following cases, among others, will show that the uniform rule has been to deny with \$10 motion costs. *Leavy v. Roberts*, 8 *Abb. Pr.* 310; *Oakley v. Sears*, 7 *Robt.* 111; *Anderson v. Market Nat. Bank*, 66 *How. Pr.* 8; *Smith v. Clews*, 14 *Abb. N. C.* 465.

It clearly appears from the opinion of the court at special term upon which this motion was denied, that the only question there considered was the propriety of granting a new trial upon the ground of newly discovered evidence, and the motion, therefore, presents only the question here discussed.

My attention has been called to the case of *Warner*

Hosley v. Colerick.

v. Western Transportation Co. (5 *Robt.* 490), which holds in accordance with the views of the defendant.

The question does not seem to have much consideration in that case, and as it does not seem to have been followed in that Court (*Oakley v. Sears*, 7 *Robt.* 111), I am constrained to follow the greater current of authority, which is not in accordance with that case.

The defendant insists that the conclusion here reached is erroneous, for the reason that it deprives him of \$10 costs allowed by section 3251 for making and serving amendments to a case.

I am of the opinion that for the purpose of a motion for a new trial for newly discovered evidence the service performed in preparing and serving amendments is to be treated as part of the preparation for opposing the motion, for, as we have seen, if the defendant is entitled to tax this item against the plaintiff, on the denial of the motion the same construction would permit the plaintiff had he succeeded on his motion to tax \$20 costs against the defendant for making and serving a case, for the reasons already stated this cannot be done.

In case of an appeal from the judgment and order denying motion for new trial, the successful party would be entitled to tax the costs in controversy here, but not otherwise.

It follows that the decision of the clerk should be affirmed, but as the question presented does not seem to have been expressly decided in this court without costs of this motion.

Motion denied, without costs.

Imhoff v. Wurtz.

IMHOFF v. WURTZ.

COUNTY COURT OF ERIE COUNTY, FEBRUARY, 1886.

§§ 469, 721, 723, 3229.

Infant plaintiff.—When complaint properly dismissed for non-appointment of guardian *ad litem*.—Appointing *nunc pro tunc*.—Costs

Where an infant brought an action in her own name without having a guardian *ad litem* appointed, and the defendant, not knowing she was an infant, served an answer containing a general denial, and upon learning of her infancy, on her cross-examination at the trial, moved to dismiss the complaint,—*Held*, that the motion was properly granted, and that a motion by the plaintiff that the non-suit be set aside, and that an order appointing a guardian *ad litem*, with the usual petition, affidavit and consent, be filed *nunc pro tunc* could not be granted. [4]

Smart v. Haring (14 *Hun*, 276) distinguished.

No provision is made for awarding costs in such a case against the infant personally, and the dismissal of the complaint should be without costs of the action. [3] The statute providing for the recovery of costs by the successful party must be held to apply only when the parties are properly before the court, and not to a case where the plaintiff is an infant without a guardian, and is for that reason turned out of court on defendant's motion. [3]

The provisions of the Code of Civil Procedure (§ 469), which require that "before a summons is issued in the name of an infant plaintiff," a guardian *ad litem* must be appointed for him, are mandatory, and, therefore, jurisdictional, and if these requirements are not complied with the plaintiff is not properly in court, and his complaint must be dismissed. [2]

(Decided, February 18, 1886.)

Motion by the plaintiff, Clara Imhoff, that an order of non-suit heretofore granted in this action be set aside; and for leave to file a petition for appointment of guardian *ad litem*, with the usual affidavit and consent of guardian, and an order appointing such person guardian *nunc pro tunc*.

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The opinion states the facts.

F. R. March, for plaintiff and motion.

G. H. Wende, for defendant, opposed.

HAMMOND, Co. J.—The plaintiff is an infant of the age of 19 years, and brought this action in her own name against the defendant, for malicious prosecution, without having a guardian *ad litem* appointed to bring the action.

The defendant, not knowing plaintiff was a minor, put in an answer containing a general denial, and upon the issue thus formed the parties proceeded to trial.

Upon the cross-examination of plaintiff, defendant first discovered she was only 19 years of age, and thereupon moved that the complaint be dismissed upon that ground, it being conceded that no guardian *ad litem* had been appointed for plaintiff in the action.

Against the objection and exception of plaintiff the motion was granted, and judgment of non-suit ordered entered; and she now makes this motion to set aside the non-suit, and for leave to file papers *nunc pro tunc*, as before stated.

The only question is whether the motion for non-suit was properly granted, or whether it should have been denied, and plaintiff allowed to file her papers *nunc pro tunc*, and the action proceeded.

Section 469 Code of Civil Procedure provides as follows: "Before a summons is issued, in the name of an infant plaintiff, a competent and responsible person must be appointed, to appear as his guardian, for the purpose of the action, who shall be responsible for the costs thereof."

I have not been referred to, or been able to find any case precisely in point.

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The case of *Smart v. Haring* (14 *Hun*, 276) is [1] not decisive of this question, because there the plaintiff arrived at the age of 21 years before the trial, and the question was not raised until after the infant was in fact of age.

The several other cases cited by plaintiff were mostly cases of infant defendants, and therefore distinguished from the cases at bar.

Neither do I think section 721 helps out the plaintiff, because that section refers only to defects which are cured by verdict, report or decision, and here the objection was raised, before that stage of the action, and as soon as defendant knew of the defect.

Section 723 is concerning amendments, and here there was no paper to *amend*, but the request of plaintiff is to be allowed to go back and execute and file entirely new papers, by which alone she could properly, in the first instance, get into court.

It seems to me that the word "must," as used in [2] section 469, abovequoted, is mandatory, and therefore jurisdictional, instead of only permissive, as claimed by plaintiff; and that if the requirements of the section are not complied with, the plaintiff is not properly in court, and her complaint must be dismissed.

The section provides for the appointment of a "guardian, for the purpose of action, who shall be responsible for the costs thereof."*

This is something upon which the defendant has a right to insist, but I do not know of any statute or rule of practice which provides for awarding costs in an action of this kind, against an infant plaintiff personally.

* Section 3249 of the Code of Civil Procedure provides as follows : "Where costs are awarded against an infant plaintiff, they may be collected, by execution or otherwise, from his guardian *ad litem*, in like manner as if the latter was the plaintiff."

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The statute which provides for the recovery of [3] costs by the successful party,* in such a case, must be held to apply only when the parties are properly before the court, and not to a case like this, when the plaintiff is an infant with no guardian, and is *for that reason* turned out of court, on defendant's motion.

The order heretofore made dismissing the plaintiff's [4] complaint must be allowed to stand, but without costs of the action, and this motion denied, without costs against the infant plaintiff.

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DAY, APPELLANT, v. THE BANK OF THE
STATE OF NEW YORK, IMPEADED WITH THE
MUNICIPAL GAS LIGHT COMPANY OF NEW
YORK, RESPONDENTS.

SUPERIOR COURT OF THE CITY OF NEW YORK,
GENERAL TERM, DECEMBER, 1885.

§§ 484, 488.

Demurrer—Misjoinder of causes of action.

Where a complaint in an action against two defendants sets out such facts as would be the foundation of two separate causes of action, one against each defendant, the question on a demurrer thereto, on the ground that it improperly unites causes of action, is not whether the statement of facts is sufficient to show that the causes of action exist, but only the natures of the causes of action are to be considered.

Where a complaint alleged that the plaintiff was the owner of certain stock of the defendant, the M. G. L. Co.; that the certificates of such stock had been wrongfully taken from him, and with forged assign-

* The statute here referred to is evidently section 3229 of the Code of Civil Procedure, providing for the recovery of costs by the defendant when the plaintiff is not entitled to costs.

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ments thereof delivered to the defendant, B. S. N. Y., who claimed to be the lawful owner thereof ; that the said M. G. L. Co., although requested, had refused to recognize the plaintiff as the owner, and demanded judgment that the plaintiff be declared to be the owner of the shares ; that the M. G. L. Co. be compelled to recognize him as such and account for all dividends, etc.,—*Held*, that two causes of action were improperly united.

(*Decided, December 7, 1885.*)

Appeal by plaintiff from judgment entered upon an order and interlocutory judgment sustaining defendant's demurrer to the complaint, on the ground that it improperly unites causes of action.

The complaint averred that the plaintiff is the owner of certain shares of the capital stock of the defendant, The Municipal Gas Light Company, and was formerly in possession of the certificate for the shares ; that the said certificate was wrongfully, and without his knowledge, taken from his possession and delivered to the defendant, The Bank of the State of New York, having upon it certain instruments purporting to authorize the transfer of the shares, and to be signed by the plaintiff ; that plaintiff's name had been forged upon the instruments ; that the plaintiff had requested the bank to return the certificate to him, and that it had refused to do so, and has claimed, and does claim that the certificate has been duly assigned to it, and that it is the lawful owner thereof ; that in consequence, the defendant, The Municipal Gas Light Company, although requested, has refused to recognize the plaintiff as the owner of the shares ; and it demands judgment that the plaintiff may be adjudged to be owner of the said shares ; that The Municipal Gas Light Company may be compelled to recognize him as such owner, and to act accordingly ; to account for dividends already declared, which have not been paid to him, etc.

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The defendant, The Bank of the State of New York, demurred on the ground that causes of action had been improperly united.

F. Lord and *John E. Parsons*, for plaintiff-appellant.

Shipman, Barlow, Larocque & Choate, for defendant-respondent.

SEDWICK, Ch. J.—[After stating the facts] I think there can be no doubt that the complaint sets out such facts as would be the foundation of two separate actions, one against each defendant. On a demurrer of this kind it is not a question as to whether the statement of facts is sufficient to show that the causes of action exist. Only the natures of the causes of action are to be considered. If there be no other consideration to be invoked, then, under section 484 of the Code, the complaint is defective, because each cause of action does not affect both defendants.

But it must be apparent that this does not of itself necessarily decide the controversy. For there may be a narration in a complaint, which sets up causes of action severally, and yet may also show what may be called another or third cause of action, which is but a single cause, embracing the two other causes. Such pleading occurs generally in an action to enforce an equity remedy. A familiar example is a judgment creditor bringing an action to compel payment of his judgment out of property that has been conveyed, as alleged, in fraud of creditors, by separate transfers to some or all of the defendants severally. In such an instance the plaintiff might proceed against the defendants severally, and it would appear on the face of the complaint that there were several causes of action. Yet in fact the complaint would set

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out but one cause of action, which would be the right to pursue the whole of the debtor's property as a totality, and the several transferees, as claiming parts of the whole, would be competently made defendants to allow the plaintiff's remedy to be enforced.

It must then be asked what remedy beside the two causes of action just alluded to, does the plaintiff claim, which embraces the two, or to enforce which completely, it will be necessary or important to plaintiff to enforce the two.

Looking first at the claim against the bank it will not be necessary to enlarge upon the proposition that all of the plaintiff's right as against it, could be fully enforced without the presence of the gas company as a defendant. The gas company is not averred to have or claim any interest, which if set up would appear to affect the plaintiff's claim that the bank should deliver up the certificate.

The next basis for an equitable single cause of action to be examined is the plaintiff's claim against the gas company. What is that claim? The complaint states that the bank is in possession of the certificate of shares, and claims to be the holder of them, through transfers to which plaintiff's name had been placed, by forgery, and has claimed to the gas company "that by reason of the said papers, the said stock has been duly assigned to it, and that it is the holder thereof."

The complaint then avers that: "In consequence, the defendant, The Municipal Gas Light Company of New York, has refused to recognize the plaintiff as the owner of the said shares of stock." It is very important to discover what fact is pleaded in the phrase, "has refused to recognize." The complaint does not aver that the gas company has transferred to the bank upon its books the shares, or has declared any dividend to

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shareholders, or has even threatened to transfer to the bank.

These things, not being pleaded, are presumed not to exist. If the plaintiff claimed against the gas company, that it had transferred the shares to the bank, and that it should replace them in the name of the plaintiff, it might plausibly be argued that the bank could be made a party as an adverse claimant. Such is not the case. The refusal to recognize, etc., can amount to nothing more than the expression of what may be called a judgment of the gas company, as to the rights of plaintiff. As there is no demurrer to the sufficiency of this, as a statement of the cause of action, the question is not whether there can be judgment for it, but it is whether the claim of the bank, as set up in the complaint, has any relation to the position of the gas company, which would deprive the plaintiff of the advantages of the judgment he claims against the company. It does not seem to have any relation. It seems that the refusal to recognize was the consequence of the bank making the claim set out in the complaint, upon certain assertions of fact, in the nature of evidence; but that would be immaterial to the plaintiff obtaining judgment for a recognition, if the plaintiff could furnish sufficient evidence that the assertions of fact were untrue. The plaintiff could enjoy such a judgment to every extent, and the claim of the bank would not be an incumbrance upon it, or impair or diminish its advantages. It could be obtained with the certificate in the hands of the bank; for on the pleadings it is still plaintiff's property, and the apparent assignment upon it is really a nullity. I do not, therefore, see that the claim against the bank has any connection with that against the gas company.

Nor do I perceive in the complaint any claim of the plaintiff of which the several claims against the defend-

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ants are parts or branches. So far as it may be the right to obtain a delivery of the certificate from the bank, the refusal of the gas company to recognize the plaintiff is immaterial.

There is no claim to obtain title or possession, of which it is averred the plaintiff has been wrongfully deprived. The complaint shows that both are perfect in plaintiff. The claims are several in their nature, and have no bearing upon a common subject matter, unless it be that of possession or title, and for neither of these is the action brought. I am of opinion that the case was correctly decided below.

Judgments and orders appealed from affirmed, with costs.

VAN VORST and FREEDMAN, JJ., concurred.

ESTATE OF JOHN BRENNAN, DECEASED.

SURROGATE'S COURT, NEW YORK COUNTY,
JANUARY, 1886.

§§ 2472 SUBD. 3, 2481, SUBD. 4.

Executor and Administrator—Restraining from exercising functions of office—Power of surrogate.

The general right of an executor or administrator to sell at his pleasure, the personal property of his decedent's estate in order to provide means for the payment of debts and of legacies or distributive shares is well settled, and it is also well settled that where an estate has two or more executors or administrators, each of them has full control of the assets, and may dispose of the same without the co-operation of his associate, and the enjoyment of this right cannot be lawfully restrained by the surrogate merely because of a disagreement between executors or administrators as to the time when, or the circumstances under which such right can most advantageously be exercised.

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Where one of two administrators, applied to the surrogate for an order restraining her co-administrator from selling certain personal property belonging to the estate, on the ground that it could be sold to better advantage three months later, and it appeared that the estate was insolvent, and that the property was employed in a business carried on by the moving party as administratrix, which was attended with expense and no little risk,—*Held*, that the surrogate had no power to grant the application; that even if he had such power, it should be denied upon the merits; that the case was eminently one in which the persons to whom the law has committed the management of the estate should be permitted to decide according to their own discretion what course the best interests of the estate require them to pursue.

The authority given the surrogate by section 2472 (subd. 3) of the Code of Civil Procedure to "direct and control the conduct of executors, administrators and testamentary trustees" is to "be exercised in the cases and in the manner prescribed by statute," and does not empower the surrogate to interfere with the orderly discharge by an administrator of ordinary administrative functions.

The cases on the subject cited and reviewed.

(*Decided, January 26, 1886.*)

Motion by an administratrix for an order, restraining, etc., her co-administrator.

The facts are set out in the opinion.

ROLLINS, S.—The administratrix of this decedent's estate asks for an order restraining the administrator, who is associated with her in its management, from selling certain property belonging thereto. She alleges in her moving affidavit that she has continued, since the decedent's death, to carry on the livery stable business which he conducted in his lifetime, at No. 164 Division street in this city; that her management of that business has been profitable to the estate; that she is informed and believes that it is the purpose of the respondent to make early sale of the horses, carriages and other property used in such business; that such sale would at this season of the year be inadvisable and ought, for the best interests of the estate, to be postponed until April next.

The administrator alleges in reply that he is acquainted

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with the value of horses, carriages, harness, etc.; that this estate is insolvent; that it is indebted to the firm of which he is a member in the sum of \$4,200; that he is unwilling that the assets for which he is liable should be longer at the risk of the business carried on by the administratrix, and that for reasons specified by him, a sale thereof should be effected at once. He declares that his views are shared by the sureties on the administration bond, and has filed their affidavits in support of his assertion. Answering affidavits have been presented in behalf of the administratrix.

Now, under these circumstances, has the surrogate jurisdiction to grant the relief for which the administratrix prays? And, if he has such jurisdiction, should that relief be granted?

FIRST.

The only statutory provision which expressly authorizes the surrogate to restrain an executor or administrator from exercising the functions of his office is sub-division 4 of section 2481 of the Code of Civil Procedure.

It is there declared that a surrogate may "enjoin by order an executor, administrator, etc., etc., *to whom a citation or other process has been duly issued* from acting as such until the further order of the court."

This grant of authority is manifestly not broad enough to warrant the issuance of such an order as is here sought.

Counsel for the administratrix invokes in her behalf the jurisdiction with which this court is vested by section 2472. That section provides (sub-division 3) that the surrogate may "*direct and control the conduct of executors, administrators and testamentary trustees.*" This power of direction and control is limited by the concluding words of the section; which declare that it "must be

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exercised in the cases and in the manner prescribed by statute."

A similar limitation was placed upon the surrogate's authority by the statute which was in operation before the Code was enacted. Sec. 1, tit. 1, chap. 2, part 3, Rev. Stat. (3 Banks, 6th ed., 325).*

The meaning of this expression, "to direct and control the conduct . . . of executors and administrators," as used in the statute just cited, has been on several occasions the subject of judicial determination.

In 1845 Chancellor WALWORTH held, in *Matter of Parker* (1 *Barb. Ch.*, 154), that the power conferred by the words in question would not warrant the surrogate in restraining an executor from disputing in a court of law, the liability of his testator's estate upon such testator's promissory note, or from prosecuting a bill of discovery for ascertaining the consideration upon which such note was based.

"It is difficult," said the Chancellor, in the case just cited, "to say *what* direction and control over executors and administrators was intended to be given, . . . but it is hardly to be presumed that the Legislature intended to confer such a power as is claimed in this case. . . . The only course is to leave it to the executor under his oath of office faithfully and honestly to discharge his duty, . . . and if he violates that duty, he should not be allowed in his accounts the loss which the estate sustains."

Bliss v. Sheldon, 7 *Barb.* 152 (1849), was an appeal from a surrogate's order requiring certain executors, who filed an inventory, but had neglected to set off any part of the property to their testator's widow as articles exempt, to pay the sum of \$150 to such widow in lieu of what she would be entitled to receive under the exemption laws. In sustaining the order of the surrogate,

*2 R. S. 220, § 1.

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which was assailed for alleged want of jurisdiction to make it, the supreme court said: "Under the third subdivision" (of section 1, *supra*) "the surrogate has plenary power to control the conduct of executors and administrators. The words are general, and would seem to be directly applicable to a case in which an executor *persists in exercising the functions and discharging the duties of his trust erroneously or irregularly*; and any person who suffers any injury by the erroneous action of the executor in his proceedings in the surrogate's office may lawfully call upon the surrogate to control his conduct."

In *Seaman v. Duryea*, 10 *Barb.* 523 (1851), the supreme court, in construing the provision of the Revised Statutes which empowered surrogates "to appoint guardians for minors and to direct and control their conduct," said: "The power to direct and control the conduct of guardians cannot be a barren power.

. . . The authority to appoint and remove guardians and to direct and control their conduct given by law to a court of justice, must comprehend the power to compel them to do *whatever the law requires them to do*." In accordance with this interpretation, the court held that a surrogate had jurisdiction to decree the time when, the person to whom, and the manner in which a superseded guardian should deliver over the property of his ward.

Dubois v. Sands, 43 *Barb.* 412 (1864), was a proceeding in which a surrogate had ordered an executor who was directed by his testator's will, to expend for the benefit of children the interest of a certain legacy, as their necessities required, to account and pay over such interest into the surrogate's court. The supreme court held, on appeal, that the statute which empowered a surrogate "to direct and control the conduct of executors," etc., gave him authority to compel executors to perform what was their manifest duty under their testator's will.

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Wood v. Brown, 34 N. Y., 337 (1866), was an appeal from a supreme court judgment in an action wherein an executor had sought to obtain an injunction against his co-executor and a revocation of his letters on the ground of gross maladministration. It was held that under the circumstances there appearing, the supreme court was authorized to control the conduct of the defendant so far as to compel him to place the assets of the estate where they would be accessible to the plaintiff, and so far, also, as to prescribe the mode in which the defendant should co-operate with his associate in discharging his duties under the will.

MORGAN, J., in the course of his opinion affirming the judgment below, declared that a surrogate might interfere to control the conduct of an executor in case such executor refused "to perform the duties which the law casts upon him and which are necessary to preserve the estate." *"This power,"* he added, *"is not arbitrary, and can only be invoked in aid of some regular proceedings which the statute authorizes to be taken against executors and administrators."* The surrogate cannot, for instance, prevent an executor from defending or prosecuting a suit, *nor can he interfere with an executor to control him while in the orderly discharge of his duties."*

Burt v. Burt, 41 N. Y. 46 (1869), was a suit between two executors as to the custody of funds. The supreme court adjudged that the defendant should place the same in the custody of a person specified, and that thereafter both the plaintiff and defendant should put all moneys received by them in a designated depository, to be drawn out only on their joint check. It was held on appeal that in the absence of any mismanagement or misappropriation of assets, or of any misconduct likely to put in serious jeopardy the interests of creditors or legatees, the supreme court had no power thus to interfere between executors.

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WOODRUFF, J., writing for reversal (all his associates concurring), said that the case of *Wood v. Brown*, *supra*, could only be upheld on the ground that the executor whose conduct was there subjected to control had been guilty of misconduct in office ; had greatly embarrassed the administration of the estate, and had imperiled the interests of the beneficiaries under the will.

No case decided since *Burt v. Burt* has fallen under my observation which takes any broader view than is there declared respecting the right of courts to control the conduct of executors and administrators. Even if the allegations in the affidavits of the administratrix were wholly uncontroverted, I should feel bound, therefore, to deny this application.

The general right of an executor or administrator to sell at his pleasure the personal property of his decedent's estate in order to provide means for the payment of debts and of legacies or distributive shares is, of course, well settled. *Regus v. Squires*, 26 *Hun*, 388 ; *Bradner v. Faulkner*, 34 *N. Y.* 347 ; *Sherman v. Willett*, 42 *N. Y.* 146.

It is equally well settled that where an estate has two or more executors or administrators, each of them has full control of the assets, and may dispose of the same without the co-operation of his associate. *Douglass v. Satterlee*, 11 *Johns.* 16 ; *Wheeler v. Wheeler*, 9 *Cow.*, 34 ; *Hertell v. Bogert*, 9 *Paige*, 52.

The enjoyment of this right cannot be lawfully restrained by the surrogate merely because of a disagreement between executors or administrators as to the time when or the circumstances under which such right can most advantageously be exercised.

The situation, as described in these moving papers, is eminently one in which the persons to whom the law has committed the management of this estate should be per-

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mitted to decide according to their own discretion what course the best interests of the estate require them to pursue.

The decision of the question whether an immediate sale of the livery stable property is desirable, or whether, on the other hand, it is better to delay such sale for three months, involves the exercise of ordinary administrative functions with whose "orderly discharge," the surrogate is powerless to interfere (*Wood v. Brown, supra*).

SECOND.

Even if I had the power to grant this motion, I should not exercise it in view of the answering affidavits. It is by no means clear that a longer continuance of the business left by the decedent would be advantageous to the persons interested in this estate. It would occasion expense and be attended with no little risk.

Except under extraordinary circumstances, such as do not seem to exist in the case at bar, courts are inclined to look with disfavor upon such a course as this administratrix seems disposed to adopt.

Motion denied.

White's Bank of Buffalo v. Farthing.

WHITE'S BANK OF BUFFALO, RESPONDENTS
v. FARTHING ET AL.
THE GERMAN-AMERICAN BANK OF BUF-
FALO ET AL., APPELLANTS.

COURT OF APPEALS, JANUARY, 1886.

§ 452.

Judgment creditors' action—Effect of judgment in, on the liens of other judgments against the debtor—Parties—Bringing in other judgment creditors.

The result of a judgment creditor's action to set aside, as fraudulent, a conveyance of real property, will not affect the liens of judgments recovered against the grantors in such conveyance, whatever may be its form, [¹,²] but if the judgment in such action sets aside the conveyance, the land will remain charged with liens of the several judgments in the order of their docketing, and if it goes further and appoints a receiver and directs a sale by him, the purchaser will, at the receiver's sale, take title as of the time of the conveyance to the receiver, subject, however, to the judgments other than the plaintiff's. [¹] A judgment establishing the lien of another judgment on real property owned by the debtor, but the legal title to which is not in him, will not affect the rights or remedies of other judgment creditors of such debtor or prevent their bringing similar actions to reach such property. [³]

Judgment creditors may unite in an action to set aside a conveyance by the common debtor, made in fraud of their rights as creditors, [⁴] but this is not a rule of obligation, but one conferring authority only, and all the judgment creditors are not necessary parties to such an action, and the rights and remedies of those not parties thereto will not be prejudiced by the judgment therein. [⁴,⁷]

Although the court undoubtedly has power to require the plaintiff, in a judgment creditor's action, to set aside a fraudulent conveyance, to bring in as a party defendant, a judgment creditor of his judgment debtor, it is not required by the Code of Civil Procedure (§ 452) to do so. [⁵]

People v. Albany & Vermont R. R. Co. (77 N. Y., 232); Osterhoudt v. Supervisors of Ulster (98 Id. 239), distinguished. [⁷]

(Decided January 26, 1886.)

White's Bank of Buffalo v. Farthing.

Appeal by certain judgment creditors of the defendants, Matilda Farthing, from an order of the general term of the supreme court, in the fifth department, affirming an order of the special term.

This action was brought by the plaintiff as a judgment creditor, to set aside a conveyance of certain real property alleged to have been made for the purpose of defrauding this plaintiff, and to charge with the lien of his judgments certain other real estate which, it is asserted, was owned by the husband of the defendant, Matilda Farthing, now deceased, in his lifetime, and conveyed to the defendant, John Kelly, as security for a debt which has since been paid, and to which property the defendant, Matilda Farthing, is alleged to be entitled as her husband's devisee; and, also, to have a certain mortgage upon real property to which the defendant, Matilda Farthing, has title, given by her to her father, the defendant, John Kelly, declared null and void. The judgments upon which the action was founded were recovered February 4, and February 27, 1884, and executions issued thereon were duly returned wholly unsatisfied.

The German-American Bank of Buffalo, The Third National Bank of Buffalo, and The Merchants Bank of Buffalo, having each recovered judgments against the defendants, Matilda Farthing and Thomas Farthing, moved, under section 452 of the Code of Civil Procedure, that the plaintiff be required to amend the summons and complaint and all papers in the action by making them parties defendant. The motion was denied at special term, and the order thereupon entered affirmed by the general term, and this appeal was taken from its order of affirmance. It appeared that the appellant, The German-American Bank of Buffalo, had prepared a complaint shortly prior to the commencement of this action,

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with a view to bringing an action to reach the property conveyed to John Kelly, and had commenced an action to reach certain property concerning which this action was brought, and that all the alleged fraudulent conveyances made by the defendant, Matilda Farthing, were made prior to the recovery of any judgment against her by any of the parties to this appeal.

Adelbert Moot, for appellants.

Truman C. White, for plaintiff-respondent.

ANDREWS, J.—The judgments in favor of The German-American Bank were recovered November 13, 1883, and the deficiency judgment in favor of the banks, other than the plaintiff, April 8, 1884. The judgment in favor of the plaintiff's bank was recovered February 4, 1884, and this action was commenced November 14, 1884. The several judgments became liens on lands fraudulently conveyed by Matilda Farthing, the judgment debtor, in the order of their docketing, and they could have been sold on executions issued on the judgments. The plaintiff, however, elected to bring its action to remove the alleged fraudulent obstruction created by the conveyances. If it succeeds in establishing the fraud, it will be entitled to a judgment setting aside the conveyances simply, in which case it can proceed to enforce its judgment by a sale of the land on execution unembarrassed by the cloud created, or the court may proceed further and compel the fraudulent grantees to convey the lands to a receiver, to be sold to satisfy the plaintiff's judgment.

The judgments in favor of other banks will in no way be affected, whichever form the judgment in [1] this action may take. If it simply sets aside the fraudulent conveyances, the land will remain charged

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with the liens of the several judgments in order of their docketing, and the proceeding to enforce them will be regulated by the statute. If it goes further and appoints a receiver and directs a conveyance to him, a purchaser, under the receiver's sale, will take title as of the time of the debtor's conveyance to the receiver, subject, however, to the judgments in favor of the banks other than the plaintiff. *Chautauqua County Bank v. Risley*, 19 N. Y. 369.

The result of the plaintiff's action will not, therefore, affect the liens of the judgments in favor of the other banks who seek to intervene in this action.

The plaintiff seeks also to charge the Swan street lot with the lien of its judgment, on the ground that George Farthing caused it to be conveyed to Kelly, as security for a debt owing by him to Kelly, which has since been paid; that the judgment debtor, Matilda Farthing, as the devisee of George Farthing, is entitled to the land. The other banks may commence similar actions to reach the Swan street lot, and the plaintiff's action, followed by judgment in accordance with the relief demanded, will not prejudice any right which the other banks may have to enforce their judgments against it.

According to the rule established in this State judgment creditors holding distinct and several judgments may unite in an action to set aside a conveyance by the common debtor made in fraud of their rights as creditors. *Brinkerhoff v. Brown*, 6 Johns. Ch. 139. This is a convenient rule, but it is not a rule of obligation, but one conferring authority only. It has never been held that all judgment creditors so situated were necessary parties to such an action. We think section 452 of the Code does not require the court, on application, to compel a plaintiff to bring in a judgment creditor

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[⁵] not originally made a party, as a party to an action instituted by him to set aside a fraudulent conveyance, although its power to direct it to be done cannot be doubted. The rights of the creditor not made a party will not be prejudiced by the judgment in that action. A judgment creditor has no title to the land of the judgment debtor, but a lien only which may by subsequent proceedings, become the foundation of title; nor has he any interest in the subject matter of the action brought by another judgment creditor, within the meaning of the section. He may have an interest which will be subserved by having the conveyance set aside. But he will not be concluded by a denial of that relief in the action of the other creditor, and whatever the result of that action may be, his rights and remedies remain as before.

The cases of *People v. Albany & Vermont R. R. Co.*, (77 N. Y. 232) and *Osterhoudt v. Supervisors of Ulster* (98 *Id.*

239), cited by the appellant, are not analagous. No [⁷] effectual judgment could be rendered in those actions without directly cutting off or impairing rights of persons not parties, and it was held, in accordance with the settled rule in equity, that they should be brought in so that they might be a complete determination of the controversy.

We think the order appealed from was discretionary, and that the appeal should therefore be dismissed.

All concurred.

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DORLAN, APPELLANT, v. WILSON, RESPONDENT

CITY COURT OF NEW YORK, GENERAL TERM,
DECEMBER, 1885.

§ 724.

Security required as condition of opening default—When justification of, not required—Form, etc., of, how determined.

Where an order opened a judgment taken by default, upon the payment of \$10, and the giving of "security to be approved by one of the justices of the court for the payment of any judgment" that may be recovered, etc., and did not prescribe the form of security, nor the number of sureties, nor the penalty, nor provide for the justification of the sureties,—*Held*, that the order was complied with by the payment of the costs, and the giving and approval of a bond; that the form of the security was to be determined, and the sufficiency of the sureties ascertained by the justice granting the relief in any manner he directed, and it was not necessary that the sureties justify, unless he required it; that the approval endorsed on the bond by the court was conclusive evidence that it was a compliance with the order, and if it was not a strict compliance with the order, the remedy was to apply to the court to vacate the approval, on the ground of irregularities, specifying them.

In such a case the power of the court to require security is derived from section 724 of the Code of Civil Procedure, which provides that "the court may upon such terms as justice requires" relieve a party from a judgment taken by default, etc., and under its provisions the court, if it requires security, may determine its form, and if the security given answers the requirements of the order and is approved of, the relief granted follows as of course.

Good practice requires that a bond given in a legal proceeding should state the residence, if not the occupation of the surety.

(Decided December 21, 1885.)

Appeal from order denying motion by plaintiff for judgment.

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Plaintiff, on the 15th day of August, 1885, obtained an order directing judgment herein in his favor. Defendant applying for relief therefrom, on the 10th day of September, 1885, obtained an order permitting him to defend, provided he pay certain costs and give security to be approved by one of the justices of this court, for the payment of any judgment which the plaintiff may herein recover against the defendant. On the 26th day of September, 1885, defendant gave a bond which was marked "approved," by Mr. Justice HALL. On the 28th day of September, 1885, plaintiff excepted to the sureties, and the defendant failing to have them justify, motion was made for judgment as for failure to comply with the conditions of the order. The motion was denied; Mr. Justice NEHRBAS, in deciding it, filing the following memorandum :

"Inasmuch as the order requiring surety contains no reference to a justification of the sureties, such justification will not be compelled. Motion denied, \$10 costs to abide event."

From the order thereupon entered, this appeal was taken.

Charles H. Preyer, for plaintiff-appellant.

Allen Lee Smidt, for defendant-respondent.

MCADAM, Ch. J.—The order appealed from must be affirmed, for the following reasons :

I. The order made September 10, 1885, relieved the defendant from the effect of the order of August 15. (1) on payment of \$10 costs, and (2) on giving security to be approved by one of the justices of the court for the payment of any judgment to be recovered, etc. Security to the effect required was given, and it was approved of as

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required by the order, and the ten dollars costs were paid. This was a full compliance with the order of September 10th, and gave the defendant the benefit of all that order afforded.

II. The security was in the form of a bond, and its authority was the order of September 10th. As the bond derives its binding force from that order, it is valid if drawn in compliance with it, and the approval indorsed thereon by the court, is conclusive evidence of the fact that it is a compliance with the order. I use the word conclusive, because if not a strict compliance with order, the remedy of the defendant was to apply to the court to vacate the approval on the ground of irregularity, specifying it. If the objection was found to be well taken the approval would, no doubt, have been set aside, and the court might or might not have allowed a new bond to be given in a form which would have obviated the objection, but while the approval stood upon the bond it was evidence that the requirements of the order had been complied with, because the order in terms makes the approval the test of this fact. The order does not prescribe the form of the security, nor the number of sureties, nor the penalties, nor does it provide for the justification of the sureties; it simply requires "security to be approved by one of the justices of the court for the payment of any judgment to be rendered, etc.," and this provision as before suggested was fully complied with.

III. The security was not in the form of a statutory undertaking in respect to which the provision of the Code as to justification apply, but in the form of security by bond, the character which is left to the judge granting the relief to determine, and the sufficiencies of the sureties is to be ascertained in any manner the judge directs. There is to be no justification in open court unless the

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judge requires it, and the sureties may be approved on a simple affidavit of their sufficiencies, if that kind of proof satisfies the conscience of the judge that the sureties are sufficient. If the judge intends that the sureties shall justify in court, if excepted to, that provision should be inserted in the order, before the party for whose benefit the bond is given can claim that privilege as one of right. If such a justification is ordered, the party obtaining the favor must comply with the requirements, or the relief he seeks will be denied for non-compliance with the conditions on which his default was excused. The power of the court to regulate this matter is derived from section 724 of the Code, which provides that "the court may upon such terms as justice requires," relieve a party from a judgment taken against him by default through inadvertence. Under this provision, if the court requires security, it may determine the form of the security, and if the security given answers the requirements of the order, and is approved of, the relief granted follows as of course. The security given in this case met all the requirements of the order, and the costs having been paid, the defendant was fully relieved from his default, and, being relieved, the plaintiff could not make a new application for judgment simply because the sureties would not appear in open court for examination as to their sufficiency. The court had imposed no such condition, and the plaintiff could not exact it, and there is no statute that requires it.

IV. The bond given is not exactly in the form required by good practice; the surety ought to have given his residence, if not his occupation, so that the plaintiff might know at once where the sureties resided, so that the plaintiff might know who to proceed against, in case it became necessary to prosecute the bond, and on a motion made for the purpose, the court would no doubt have re-

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quired the defendant to give the residence or occupation of the surety, or would have required a new bond containing the residence and occupation of the surety.

V. If the court had been imposed upon by fictitious bail, it might, and no doubt would, upon being informed of the fact by proper proofs, have required a new and sufficient surety, and might have punished the party guilty of the imposition ; but no such charge was proved. On the contrary, the plaintiff proceeded on the theory that he was entitled to a justification as a matter of right. True, he alleged that he could not find the surety, but the trouble is, that he did not know where to look for him, a difficulty which might and would have been overcome if the plaintiff had made the motion suggested in the preceding paragraph. The truth is, that the plaintiff has misconceived the practice. The court below did not err in making the direction appealed from, and it follows, therefore, that the order must be affirmed, with costs.

HALL and HYATT, JJ., concurred.

BRIGGS ET AL., RESPONDENTS v. FREEDMAN,
APPELLANT.

SUPREME COURT, FIRST DEPARTMENT, GENERAL
TERM, OCTOBER, 1885.

§ 538.

Counter-claim—Striking out verified answer setting up.

Where in an action on two promissory notes against the maker thereof, the defendant's answer set up "for a defence and as a counter-claim" that the notes sued upon were given for goods, wares and merchan-

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dise, and that it was agreed at the time of the sale, that the goods should be billed and charged at the actual cost thereof, and an addition of a commission of five per cent., and that when the notes in suit were given it was represented that they were for the proportionate parts of the cost of the goods and the commission added; that the plaintiffs overcharged the defendant on the actual cost of the goods \$2,500, which amount should be deducted from the amount of the debt, and the notes surrendered to him and canceled, and asked judgment for said sum,—*Held*, that the answer set up a counter-claim, and being verified could not be stricken out on motion as sham.

An answer containing a counter-claim which is verified cannot be stricken out as sham upon an *ex parte* affidavit of its falsity.

Collins v. Swan (7 Robt., 94); Fettech v. McKay (47 N. Y. 426), followed.

(Decided October, 30, 1885.)

Appeal by defendant from order striking out his answer as sham.

The action was brought to recover the sum of \$2,247.92 upon two promissory notes made by plaintiff. The answer of the defendant did not deny or otherwise controvert any of the allegations of the complaint, but "for a defence and as a counter-claim to the first and second causes of action stated in the complaint," set up a claim for overcharges by plaintiff for goods, for which the notes in suit were alleged to have been given substantially as stated in the opinion. This answer was verified by the defendant. The plaintiffs moved, upon affidavits, to strike out the answer, as sham, and the motion was granted.

Melville H. Regensberger, for defendant-appellant.

A. Blumenstiel (*Blumenstiel & Hirsch*, attorneys), for plaintiff-respondent.

DAVIS, P. J.—The answer in this case we think sets up a counter-claim. The plaintiffs sue upon notes upon which they demand judgment for a balance of \$2,247.92

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and interest. The defendant alleges that the notes sued upon were given for goods, wares and merchandise, and that it was agreed at the time of the sale that the goods should be billed and charged at the actual cost thereof and an addition of a commission of five per cent., and that when the notes in suit were given, it was represented that they were for proportionate parts of the cost of the goods and the commission added. The defendant then alleges, on information and belief, that the plaintiffs overcharged the defendant on the actual cost of the goods, the sum of twenty-five hundred dollars, which amount should be deducted from the amount of the debt, and the notes surrendered to him and canceled, and that he have judgment for the amount of his counter-claim.

This presented an issue of fact relating to the counter-claim which cannot, we think, be stricken out upon an *ex parte* affidavit of its falsity. The case is disposed of by *Collins v. Swan* (7 Rob. 94), and *Fettrech v. McKay* (47 N. Y. 426), which, in effect, hold that a verified counter-claim cannot be stricken out as sham.

The order should be reversed and the motion denied, with \$10 costs and disbursements.

BRADY and DANIELS, JJ., concurred.

Baremore v. Taylor.

BAREMORE, RESPONDENT, v. TAYLOR, APPELLANT.

SUPERIOR COURT OF THE CITY OF NEW YORK, GENERAL TERM, DECEMBER, 1885.

§ 531.

Bill of particulars—Instance of case in which properly ordered.

Where a complaint set forth claims for work, labor and services of plaintiff's assignor; for moneys had and received for the use of plaintiff's assignor and for moneys paid, laid out and expended by plaintiff's assignor, and the answer contained a general denial of each claim, and averred payment to plaintiff's assignor for his services and for moneys paid out, etc., and that defendant had accounted for any moneys received on account of plaintiff's assignor, and it appeared that the plaintiff had, at defendant's request, furnished a bill of particulars, giving credit to defendant for every payment known to plaintiff to exist, and that without a bill of particulars from defendant plaintiff would be in ignorance of the sums of money, items, dates, etc., by which defendant would attempt to prove his payments to and accounting with plaintiff's assignor,—*Held*, that an order for a bill of particulars of alleged payments to and accountings with the plaintiff's assignor was within the discretionary power of the court, and properly granted.

(Decided December 7, 1885.)

Appeal from order requiring defendant to furnish a bill of particulars.

The facts appear in the opinion.

Shipman, Barlow, Larocque & Choate and Sal. Hanford, for defendant-appellant.

Johnes, Benner & Wilcox, for plaintiff-respondent.

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FREEDMAN, J.—The complaint alleges three causes of action, viz.: 1st, Work, labor and services of plaintiff's assignor, of the value of \$1,800; 2d, Money had and received for the use of plaintiff's assignor, \$1,945.42, and 3d, Money paid, laid out and expended by plaintiff's assignor, at defendant's request, to the amount of \$590.92.

The answer consists of a general denial as to each of the causes of action, and the defense that the plaintiff's assignor has been fully paid for any services rendered, or moneys paid, laid out, or expended, and that the defendant has fully accounted for any moneys at any time received by him for account of the plaintiff's assignor.

Upon plaintiff's motion for a bill of particulars concerning the alleged payments to, and accounting had with plaintiff's assignor, it was made to appear by the affidavit of the plaintiff, that upon demand he had furnished the defendant with a bill of particulars, containing the items and details of the causes of actions set out in the complaint; that in such bill he had given to the defendant credit for every payment known to him to exist; that he has no knowledge or information as to the defendant having ever paid anything further than what he had been given credit for; and that, without a bill of particulars, he will be in complete ignorance of the sums of money, items, dates, etc., by which the defendant will undertake to prove his alleged payments to, and accountings had with, plaintiff's assignor.

These matters were not denied by any counter affidavit, and as it was apparent that the plaintiff could have no personal knowledge concerning the defendant's alleged payments to, or the accounting had with, plaintiff's assignor, a case was presented, which called for the exercise of the discretionary power of the court within the rule as laid down in *Witkowski v. Paramore* (93 N.

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Y. 467); Dwight v. Germania Ins. Co. (84 *Id.* 493); Diossy v. Rust (46 *N. Y. Super.* [14 J. and S.] 374).

Under the circumstances as they appeared, the order requiring the defendant to give to the plaintiff a bill of particulars concerning the alleged payments to, and the accounting had with, plaintiff's assignor, was a proper exercise of the power conferred by section 531 of the Code of Civil Procedure.

The order appealed from should be affirmed, with costs, etc.

SEDGWICK, Ch. J., concurred.

ROBINSON v. AMERICAN CHEMICAL CO.

SUPREME COURT, FOURTH DEPARTMENT, ONONDAGA
COUNTY, SPECIAL TERM, JANUARY, 1886.

§ 724.

Opening default—When assignee of judgment necessary party to motion to open default and set aside judgment.

Where on a motion by creditors of a corporate defendant to open a default and set aside a judgment entered thereon, against such defendant, it appeared that the judgment had been assigned by the plaintiff to a third person, and that this fact was known to attorneys for the moving parties before the service of the motion papers, but notice of the motion had not been served on such assignee,—*Held*, that the assignee and holder of the judgment was a necessary party to the motion, and the motion must be denied without considering the merits, because he had not been given notice of it.

(*Decided January 9, 1886.*)

Motion on behalf of the creditors of the defendant, a domestic corporation, to open the default in this action, and to vacate and set aside the judgment entered thereon, and permit the moving parties to defend.

Robinson v. American Chemical Co.

Knapp, Nottingham & Andrews, for creditors of defendant and motion.

Chamberlin & Ayres, for plaintiff, opposed.

KENNEDY, J.—The judgment attacked was entered by default against defendant on the 28th day of February, 1885. In the month of December, 1885, as the opposing affidavits show, the plaintiff assigned and transferred the judgment to one Alfred Howlett, who paid full value therefor, and now is the owner and holder thereof. The fact that the judgment had been assigned by Robinson was known to the attorneys for the moving parties before the service of the moving papers.

I am of opinion that Howlett, the assignee and holder of the judgment, is a necessary party to this proceeding; that without his being made such and given an opportunity to be heard, any order which might be made would in no manner affect him or the judgment of which he is the owner.

Upon this ground and without in any manner considering the question made, the motion must be denied.

If it be conceded that Howlett took the judgment, subject to all the equities between the original parties, still an order made in a proceeding to which he was not a party, and when he had no opportunity to be heard would in no manner affect him or his rights under the judgment.

An order will be entered denying the motion, with ten dollars costs, without prejudice to the right to renew, bringing in the necessary party or parties.

Collis v. Alburtis.

COLLIS ET AL., RESPONDENTS, v. ALBURTIS,
APPELLANT.N. Y. COURT OF COMMON PLEAS, GENERAL TERM,
JANUARY, 1886.

§§ 500, 537.

Answer—Instance of, held frivolous.

Where in an action upon a covenant in a written lease to pay rent, the answer admits the making of the lease pleaded, and sets forth that defendant has no knowledge or information sufficient to form a belief as to the terms or conditions thereof, or whether defendant covenanted to pay the rent reserved in the lease, or as to the performance by plaintiffs of the conditions thereof; such answer pleads no defence, and is frivolous, and judgment should be granted thereon.

(Decided February 1, 1886.)

Appeal from an order and judgment of the general term of the New York city court affirming order and judgment of the special term.

The opinion states the facts.

Edward P. Wilder, for defendant-appellant.

Adolph L. Sanger, for plaintiff-respondent.

ALLEN, J.—The appeal in this case is from an order and judgment of the city court.

The plaintiffs moved for judgment on account of the frivolousness of the answer, and the motion was granted. Upon an appeal to the general term of the city court the order was affirmed; the defendant appeals to this court from the order and from the judgment.

The action is for rent, and the plaintiff pleads a

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written lease, alleging its execution between the plaintiffs and the defendant; the covenant of the defendant to pay the rent named therein; the performance of the conditions of the lease by the plaintiffs, and the non-payment by defendant of the rent on the 1st day of March and the 1st day of April, 1885. The answer admits the making and execution of the lease, and states: 1st, That the defendant has no knowledge or information sufficient to form a belief as to the terms or conditions thereof; 2d, That he has no knowledge or information sufficient to form a belief whether he covenanted to pay the rent reserved in the lease; 3d, That he has no knowledge or information sufficient to form a belief as to the performance by the plaintiffs of the conditions of the lease; 4th, A denial that the rent claimed to be due on April 1st was ever demanded.

Of the fourth paragraph of the answer, it may be said that it was not necessary for the plaintiffs to aver a demand for the rent, and that that allegation is immaterial, and having averred it they are not bound to prove it.

This appears to be a case of a defendant who has no defence to the action against him, and who is endeavoring, by the use of the form of words prescribed in section 500 of the Code of Civil Procedure, to delay a judgment.

It is true that a defendant who has no knowledge or information sufficient to form a belief as to a material allegation in the complaint may, in his answer, deny that he has any knowledge or information sufficient to form a belief, and that amounts to a traverse. But this answer admits the plaintiffs' cause of action, pleads no defence to it; puts in issue none of the material allegations of the complaint, and does not put the plaintiff to his proof. The defendant in effect says: "I admit I made the written agreement upon which you have sued me, but I cannot recall the exact words of it."

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The answer is so palpably bad as to raise the presumption that it was interposed for the purpose of delay.

Answers of this kind have been adjudged frivolous by this court in *Wesson v. Judd*, 1 *Abb. P.* 254, and *Byrne v. Benton*, 3 *N. Y. Monthly Law Bul.* 100.

The judgment of the court below is right, and is affirmed.

LARREMORE, P. J., and BOOKSTAYER, J., concurred.

SCHWAN v. MUTUAL TRUST FUND LIFE
ASSOCIATION.

SUPREME COURT, FIRST DEPARTMENT, NEW YORK
COUNTY, SPECIAL TERM, FEBRUARY, 1886.

§ 516.

Reply—When required to new matter in answer in action on insurance policy.

Where in an action against an insurance company, to recover upon a policy of insurance, benefits accruing upon the death of the insured, the answer set up as a defence false statements in the application on which the policy was issued, and also the lapse of the policy by the non-payment of assessments,—*Held*, that the plaintiff should be required to reply to such defence.

(Decided February, 1886.)

Motion that the plaintiff be required to reply to new matter contained in the answer.

The defendant is an insurance company doing business upon the assessment plan. The action was brought to recover on a policy of insurance, issued by the defendant, on the life of plaintiff's husband, for the bene-

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fit of plaintiff, benefits which accrued thereunder upon the death of said plaintiff's husband. The answer set up, that the policy was procured by the insured, by making certain statements in a written application, and that in said application the insured made false statements and representations, and further alleged that the certificate or policy had lapsed by reason of the non-payment of an assessment levied by the defendant. Defendant made a motion to compel plaintiff to reply to these defences, as being new matter set up by way of avoidance.

Frederick S. Taylor (*Taylor & Parker*, attorneys), for defendant and motion.

The defendant should be apprised of the way in which the plaintiff proposes to avoid, what defendant claims to be a complete defence. The issues should be so settled before the parties prepare for trial. *McGin v. Torrence*, 4 *N. Y. Law Bulletin* 29; *Brinkerhoff v. Brinkerhoff*, 8 *Abb. N. C.* 207; *Hubbell v. Fowler*, 1 *Abb. Pr. N. S.* 1; *Rogers v. Mutual R. F. Life Association*, 1 *How. Pr. N. S.* 194; *Poillon v. Lawrence*, 43 *N. Y. Super.* (11 *J. & S.*) 385.

Morris Goodhart, opposed.

BARRETT, J.—Motion that plaintiff reply to the new matter by way of avoidance, contained in the answer, granted.

Griffin v. Long Island R. R. Co.

GRIFFIN, RESPONDENT, v. THE LONG ISLAND
RAIL ROAD COMPANY, APPELLANT.

COURT OF APPEALS, FEBRUARY, 1886.

§§ 500, 1720, 1723.

Replevin—Proof of title, when necessary in action of—When may be shown to be in third person—Denial in answer of each and every allegation in complaint not before admitted or controverted—When good general denial.

Where the complaint in an action to recover chattels contained all the allegations necessary to show a wrongful detention, and might by a liberal construction be held to be framed in a double aspect, both for the wrongful taking and the wrongful detention, and upon the trial, there was no proof given or offered to show a wrongful taking, but the plaintiff simply gave proof to show the wrongful detention,—*Held*, that the action should be treated as though it had been brought for a wrongful detention only.^[3]

In an action to recover chattels wrongfully detained from the plaintiff, where the taking is not complained of, the plaintiff, to maintain his action, must show his title to, and right to the possession of the chattels, and the defendant has the right, under a general denial, to controvert this by proof, and show the property and right to the possession of the chattels to be in himself or a third person, and thus defeat the action;^[4, 5] but *it seems*, that where the property was taken by the defendant from the actual possession of the plaintiff, the taking would not be justified by allegation and proof of title in a third person with which the defendant did not connect himself.^[7]

Kennedy v. Shaw (38 Ind. 474) approved; ^[6] Stowell v. Otis (71 N. Y. 36) distinguished.^[6]

Where, in an action to recover chattels wrongfully detained by the defendant from the plaintiff, who was the receiver of a railway company, the taking was not alleged to have been wrongful, and the answer denied any knowledge or information sufficient to form a belief as to the truth of the allegations in the complaint setting out the plaintiff's appointment as receiver; admitted the demand for and non-delivery of the chattels, and denied on information and belief each and every allegation of the complaint not before

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admitted or controverted, — *Held*, that the denial of each and every allegation, etc., was a good general denial;[⁹] that what had been before admitted and controverted was clearly specified, and hence there was no doubt or confusion; that this general denial put in issue not only the wrongful detention, but plaintiff's title, and upon that issue the defendant had the right to show not only title in itself, but title out of the plaintiff, and in a third person.[⁴]

Clark v. Dillon (97 N. Y. 370), distinguished.[⁹]

The rules of pleading, and as to proving title in actions of replevin at common law, stated.[^{1, 2}]

Under our system of practice, and under every rational and logical system of pleading, the defendant must, under a general denial, be permitted to controvert by evidence everything which the plaintiff is bound in the first instance to prove to make out a case.[⁸]

(Decided February 2, 1886.)

Appeal by defendant from a judgment of the general term of the supreme court, second department, affirming a judgment entered upon the verdict of a jury at circuit in Queens county.

The opinion states the facts.

Edward E. Sprague (*Hinsdale & Sprague*, attorneys), for defendants, appellant.

It is true that the complaint, in form, may be construed to state a cause of action for replevin in the *cepit*. And, had this been such an action, it would not have been competent for defendant, under a general denial, to prove its own title. For, in an action for wrongful taking, the plaintiff is not bound to prove his title; his prior possession is sufficient to enable him to maintain the action as against a wrongdoer. And, therefore, a general denial by the defendant is held merely to deny the taking, and if defendant claims title he must set it up. *Stowell v. Otis*, 71 N. Y. 36; *Beaty v. Swarthout*, 32 Barb. 293; *Anstice v. Holmes*, 3 Den'co, 244; *Siedenbach v. Riley*, 36 Hun, 211. But the plaintiff did not try this action as for an unlawful taking. . . . By a familiar rule, he

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is restricted to the theory which he has chosen, and cannot now claim that his recovery was for a cause of action which he made no effort to establish on the trial. *Genet v. D. & H. Co.*, 13 *N. Y. Weekly Dig.* 200; *McKeon v. See*, 51 *N. Y.* 300; *Sherman v. Parish*, 53 *Id.* 483; *Tyng v. Commercial Warehouse Co.*, 58 *Id.* 313; *King v. MacKellar*, 94 *Id.* 317.

Regarding the complaint then as setting up a cause of action for detention of property, replevin in the *detinet*, plaintiff was obliged to show title or the right to the possession as against the defendant. *Stowell v. Otis*, 71 *N. Y.* 36. And under a general denial defendant was entitled to prove its own title to the property in question. "It is always competent to prove under a general denial any fact tending to controvert the material affirmative allegations of a complaint." *Knapp v. Roche*, 94 *N. Y.* 333. Under the general issue, defendant may give evidence controverting any fact necessary to be established by the plaintiff to authorize the recovery. *Weaver v. Barden*, 49 *N. Y.* 297. Under a general or specific denial of any fact which the plaintiff is required to prove to maintain the action, the defendant may give evidence to disprove it. *Greenfield v. Mass. Mut. Life*, 47 *N. Y.* 437. It was, therefore, competent for the defendant to controvert plaintiff's right either of property or possession under the general denial. *Davis v. Hoppock*, 6 *Duer*, 254. Where an action representing property real or personal is sought to be sustained by a mere general allegation of possession and property or ownership, this may be put in issue by a denial without setting up in the answer facts going to show that some other person is in possession of, or ownership; for the plaintiff must prove his allegations, and the defendant under a denial may controvert them. *Miller v. Decker*, 40 *Barb.* 234; *Robinson v. Frost*, 14 *Id.* 536; *Schoenrock v. Farley*, 49 *N. Y. Super.* (17 *J. & S.*) 302.

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A. N. Weller (*Weller & Brisbane*, attorneys), for plaintiff-respondent.

Defendant had not set up the title in its answer nor in any manner informed plaintiff of the claim. Until the present Code was passed, a defendant in a replevin suit could not set up as a defense nor prove title in a third person unless he connected himself with such title. *Stowell v. Otis*, 71 *N. Y.* 36. "And such defense must be alleged to be proved. *Id.*" But since the new Code, "the defendant may by answer defend on the ground that a third person was entitled to the chattel without connecting himself with the latter's title." *Code of Civil Procedure*, § 1723. Here, however, the defendant did not connect itself with the third person's title, but omitted to set it up as a defense. The Code allows defendant to set up title in a third person as a defense, but surely it does not allow them to prove it as a defense without alleging it. The statute permits it as an affirmative defense, but, like all other affirmative defenses, it must be alleged in order to be proved. Plaintiff must be informed of the third person's title, and how it was acquired, in order that he may be prepared to meet and litigate it. *Smith v. Hall*, 67 *N. Y.* 48; *Tell v. Beyer*, 38 *Id.* 161; *Anstice v. Holmes*, 3 *Denio*, 244; *Rogers v. Arnold*, 12 *Wend.* 30. The answer must allege all those facts, which, when the plaintiff's case is proved, the defendant must prove, in order to defeat a recovery. *Ayrault v. Chamberlain*, 53 *Barb.* 229; *S. C.*, 31 *N. Y.* 614; *Carter v. Koezley*, 14 *Abb. Pr.* 147; *Allen v. Mercantile Mut'l Ins. Co.*, 46 *Barb.* 642. And defendant cannot give evidence of any defense of new matter not set up in his answer. *McKyring v. Bull*, 16 *N. Y.* 297; *Graham v. Harrower*, 18 *How. Pr.* 144; *Wehle v. Butler*, 12 *Abb. N. S.* 139; 13 *How. Pr.* 273, 565. Even though such defense appear from the evidence offered by the plaintiff. *Brazill v. Isham*, 12 *N. Y.* 9; *Paige v. Wil-*

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let, 38 *Id.* 28; Goodwin v. Mass. Mut'l. L. Ins. Co., 73 *Id.* 480; Hall v. U. S. Reflector Co., 18 *N. Y. Weekly Dig.* 7; S. C., 30 *Hun.* 375; 84 *N. Y.* 420. However, plaintiff's title was not in dispute, because defendant's answer did not controvert it. The answer first denies plaintiff's appointment as receiver; second, admits that plaintiff demanded the cars and certain other matter alleged in the complaint, and then, on information and belief, denies each and every other allegation not herein above admitted or controverted. This form of denial puts nothing in issue, and the allegation in the complaint, that the cars in question were the property of the Hempstead branch road, stood admitted by the pleadings. Luce v. Alexander, 17 *N. Y. Weekly Dig.* 528; Scott v. Royal Exc. S. Co., 5 *N. Y. Monthly Law Bul.* 64; Leary v. Boggs, 3 *N. Y. Civ. Pro.* 227; Clark v. Dillon, 4 *N. Y. Civ. Pro.* 245; Miller v. McCloskey, 1 *N. Y. Civ. Pro.* 252; McEncroe v. Decker, 58 *How. Pr.* 251; Milville Manuf. Co. v. Salter, 15 *Abb. N. C.* 305; Potter v. Frail, 67 *How. Pr.* 445, and authorities there cited; Clark v. Dillon, 97 *N. Y.* 370.

EARL, J.—This action was brought to recover the possession of two railroad cars. The plaintiff, in his complaint, alleged that he was the receiver of the Southern Hempstead Branch Railroad Company, and that he, as such, became entitled to the two cars; that some time between July 1, 1875, and July 1, 1878, the defendant took from the possession of his railroad company the two cars, then the property of that company; that the cars were in the possession of the defendant, and had been for several years, but that the defendant refused to deliver the same to the plaintiff, although before this action was commenced he made a demand upon it in writing so to do, and that it unjustly detained them from him. There is no allegation in the complaint that the defendant wrongfully

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took possession of the cars or wrongfully became possessed of them. The only wrong alleged is the refusal of the defendant to deliver the cars to the plaintiff upon his demand, and the detention of them from him after that. The defendant, in its answer, alleged that it had no knowledge or information sufficient to form a belief as to the truth of the allegation contained in the complaint, of the appointment of the plaintiff as receiver; admitted that the plaintiff had made a demand in writing of it to deliver the cars, and that it had not delivered them; denied on information and belief each and every allegation of the complaint not before admitted or controverted, and alleged on information and belief that the cause of the action set forth in the complaint did not accrue within six years before the commencement of the action, and that the property referred to in the complaint had been in the Southern Railroad Company of Long Island, and its assigns claiming title thereto, for more than six years prior to the commencement of this action.

Upon the trial, the plaintiff gave evidence tending to show that the Southern Hempstead Branch Railroad Company owned the cars, and that the title of them came to him as receiver of that company; and he proved the value of the cars, and then rested. The defendant offered to show a sale of the two cars to the Southern Railroad Company of Long Island by the persons who owned them before they were claimed to have been sold to the plaintiff's railroad company. The plaintiff objected to the evidence, and the objection was sustained, the court ruling that the question of title in a third party was not raised by the pleadings, and the defendant excepted to the ruling. Later in the progress of the trial, the defendant offered to prove title in the Southern Railroad Company of Long Island, and its successor, the Brooklyn & Montauk

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Railroad Company, and that it was the lessee of the latter company, and as such, in possession of all its property. The evidence was objected to by the plaintiff, and the objection sustained, on the ground that the title had not been set up in the answer, and the defendant excepted to the ruling. In these rulings, excluding evidence of title to the cars out of the plaintiff, we think the court erred.

The action to recover a chattel, as regulated by ['] the Code of Civil Procedure, is substantially a substitute for the action of replevin as it had previously existed. At common law and under the Revised Statutes there were two actions of replevin—one in the *cepit* and one in the *detinet*. In replevin in the *cepit* the general issue was tendered by the plea of *non cepit*, and that put in issue only the taking at the place stated in the declaration. That rule of the common law was copied into the Revised Statutes (2 R. S. 528, § 39). Under that plea, the defendant could not show title in himself or in a stranger. As it was necessary in such an action for the plaintiff only to show that he was in possession of that property and that the defendant wrongfully took it from his possession, the plea put in issue all plaintiff was, in the first instance, bound to prove. Without more, property in a third person could be no defense to such an action. Therefore, in order to defend such an action, the defendant was bound to prove either property in himself or property in a third person with which he was in some way connected and under which he could justify, and these facts he was bound specially to allege.

But in an action of replevin in the *detinet* the ['] general issue was tendered by the plea of *non detinet*, and that plea at common law put in issue, as well the plaintiff's property in the goods, as the detention thereof by the defendant. And it was pro-

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vided in the Revised Statutes (2 *R. S.* 529, § 40), that when the action is founded on the wrongful detention of the goods, and the original taking is not complained of, the plea of the general issue shall be that the defendant does not detain the goods and chattels specified in the declaration or any part thereof in manner and form as therein alleged; and such plea shall put in issue not only the detention of such goods and chattels, but also the property of the plaintiff therein. It was also proved by the Revised Statutes (2 *R. S.* 528, § 36), that the action of the replevin might be founded upon both the wrongful taking and the detention of the property, in which case it was necessary that the declaration should allege the wrongful taking, and also allege that the defendant continued to detain such property.

It cannot be doubted that this complaint contained all the allegations requisite to show a wrongful detention of the cars. By a liberal construction it might be held to be framed in a double aspect, both for the wrongful taking and the wrongful detention. Upon the trial there was no proof offered or given to show the wrongful taking of the cars, but the plaintiff simply gave proof to show the wrongful detention. Therefore, we think the action should have been treated as if it had been brought for a wrongful detention of the cars. It was necessary, therefore, for the plaintiff to show his title to the cars, and that it was necessary for him to show to maintain this action the defendant had the right to controvert by proof under its general denial. Its general denial put in issue not only the wrongful detention, but plaintiff's title, and upon that issue it had the right to show, not only title in itself, but title out of the plaintiff and title in a stranger. The plaintiff, seeking to take property out of the possession of the defendant, was bound to show title in himself, and defendant could defend

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itself by showing that he did not have title, and thus did not have the right to take from it the possession which it had acquired (*Caldwell v. Bruggerman*, 4 *Minn.* 270 ; *Jones v. Rahilly*, 16 *Id.* 320 ; *Kennedy v. Shaw*, 38 *Ind.* 474 ; *Sparks v. Heritage*, 45 *Id.* 66).

In *Kennedy v. Shaw*, decided under a system [°] of pleading similar to our own, it is said : “ Where the general denial is pleading to a complaint in an action to recover the possession of personal property, the plaintiff must show his right to the possession of the property as against anybody else. He must recover upon the strength and validity of his own title and right to the possession of the property and if the defendant can show the property and right to the possession of the property to be in himself or in a third person, he may do so under the general denial and thus defeat the action.”

This broad and general statement of the rule, [°] however, would not enable one who had taken property from the actual possession of another to justify the taking by the allegation and proof of title in a third person with which he did not connect himself.

There is nothing in the case of *Stowell v. Otis* [°] (71 *N. Y.* 36), in conflict with these views ; but regarding this as an action for the wrongful detention of the cars that case is an authority for the views we have expressed.

Under our system of practice, and under every [°] rational, logical system of pleading, the defendant must, under a general denial, be permitted to controvert by evidence every thing which the plaintiff is bound in the first instance to prove to make out his cause of action (*Griswold v. Frost*, 14 *Barb.* 536 ; *McKyring v. Bull*, 16 *N. Y.* 297 ; *Wheeler v. Billings*, 38 *Id.* 263 ; *Weaver v. Barden*, 49 *Id.* 286).

The denial in this answer of each and every

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[?] allegation of the complaint not herein above admitted or controverted is a good general denial. What had been before admitted and controverted was clearly specified, and hence there was no doubt or confusion of this general denial; and this answer is not, therefore, condemned by the decision in *Clark v. Dillon* (97 N. Y. 370).

The appellant also makes a point as to the statute of limitations. Upon the new trial, it should be permitted to prove all the facts bearing upon that defense, and then the application of the law to the facts will probably not be difficult. We do not deem it our duty to say more about it now.

The judgment should be reversed and a new trial granted, costs to abide event.

All concurred except DANFORTH, J., not voting.

SPENCER, RESPONDENT, v. WAIT, APPELLANT.

SUPREME COURT, FOURTH DEPARTMENT, GENERAL TERM, SEPTEMBER, 1885.

§§ 376, 3017.

Justice's judgment—Action on, docketed in county clerk's office—Limitation to action.

Where a judgment was recovered in a justice's court upon service of one only of two defendants in form against both of them, and a transcript was filed in the county clerk's office on which was indorsed a statement that one of the defendants—naming him—had not been served, or appeared in the action, and the judgment was docketed in the county clerk's office against the defendant served alone,—*Held*, that an action on such judgment was properly brought against the defendant served and against whom the judgment had been docketed without joining the other defendant; that

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the action could only be brought upon the judgment as docketed; that if the docket was incorrect, or defective, the proper remedy was by motion, and the irregularity would not be permitted to defeat an action upon the judgment as docketed.

A judgment recovered in a justice's court and docketed in the county clerk's office, while the Code of Procedure was in force, became, upon being so docketed, a judgment of the county court, upon which an action might be brought at any time within twenty years thereafter.

(Decided September, 1885.)

Appeal from judgment rendered upon a trial at circuit.

The opinion states the facts.

Charles D. Wright, for defendant-appellant.

James A. Ward, for plaintiff-respondent.

BOARDMAN, J.—This is an appeal from a judgment entered upon a decision of Justice VANN, upon a trial at circuit, without a jury, which was waived. The action was upon a justice's judgment, a transcript of which had been filed in the county clerk's office and docketed. In the justice's court, the summons and the judgment entered, were in form against Clark Wait and Eliza Wait, though Clark Wait was not served with the summons, nor did he appear in the action. Judgment was rendered by Justice of the peace, November 15, 1867, for :

Damages,	.	.	.	.	.	\$44.73
Costs,	.	.	.	.	.	3.25
Amount of judgment,	.	.	.	.	.	47.98
Fees of transcript,	.	.	.	.	.	.25

A transcript in that form was filed with the county clerk, upon the back of which was indorsed the fact

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that Clark Wait was not served with process and did not appear in the action. The judgment was docketed by the county clerk for \$44.73 damages, and \$3.50 costs, against Eliza Wait only. Afterwards the judgment, as docketed, was duly assigned to plaintiff, who brought this action thereon, April 23, 1883, against Eliza Wait. The defenses interposed were the non-joinder of Clark Wait as defendant, and the statute of limitations.

The action could only be brought upon the judgment as docketed. If such docket was incorrect or defective, the proper remedy was by motion. It was at most an irregularity which would not be permitted to defeat an action upon the judgment as docketed.

The judgment, when docketed in the county clerk's office, became a judgment of the county court, a court of record. The opinion of the learned justice in this case in that respect, is satisfactory and is sustained by authority (*Baldwin v. Roberts*, 30 *Hun*, 163; *Code of Civil Procedure*, § 3017; *Code of Procedure*, § 63; *Kincaid v. Richardson*, 9 *Abb. N. C.* 315; *Lyon v. Manly*, 10 *Abb. Pr.* 337).

When this judgment was docketed in the county clerk's office in 1867, section 63 of the old Code was in force, and, on the authorities cited, it became a judgment of the county court upon which an action might be brought at any time within twenty years (Old Code, § 90; New Code, § 376).

The action was not, therefore, barred by the statute of limitations applicable to judgments in justice's courts, and the decision at the circuit was correct.

The decision is affirmed, with costs.

FOLLETT and HARDIN, JJ., concurred.

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WOOD, AND ANOTHER, RESPONDENTS, v. RAY-
DURE, IMPLEADED, ETC., APPELLANT.

SUPREME COURT, FIFTH DEPARTMENT, GENERAL
TERM, JANUARY, 1886.

§§ 500, 524, 526, 3355.

Answer—Denials in, on information and belief—When not frivolous.

Denials in an answer may be upon information and belief. Such a denial is authorized by the Code of Civil Procedure, and puts in issue the allegations of the complaint to which it relates.

An answer by one of two defendants in an action against copartners, upon a promissory note alleged to have been made by them and for goods sold and delivered to them, admitting the copartnership of the plaintiffs and also of the defendants, and denying, upon information and belief, each and every other allegation of the complaint, is not frivolous.

The various sections of the Code of Civil Procedure must be construed together.

(Decided January 23, 1886.)

Appeal from the order of the Allegany special term awarding judgment, upon the ground that the defendant Raydure's answer was frivolous.

The facts are stated in the opinion.

S. E. Cheeseman, for plaintiffs-respondents.

Rufus Scott, for defendant-appellant.

HAIGHT, J.—This action was brought to recover the amount of a promissory note alleged to have been made by the defendants, who were copartners, and also for goods, wares and merchandise sold and delivered to them as such. The defendant, Raydure, answers separately and admits that the defendants

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were copartners at the time stated in the complaint, doing business under the firm name of Watson Raydure, and that the plaintiffs were copartners doing business under the firm name of Wood & Thomas, and then, upon information and belief, he denies each and every allegation of the complaint.

The only question presented for our consideration, is whether or not a defendant can deny *upon information and belief*. Upon this question, there appears to be some conflict in the authorities. In the case of *Swinburne v. Stockwell* (58 *How. Pr.* 312), TAPPAN, J., at special term, held, that such an answer was frivolous and not authorized by the Code. This case was followed in the case of *Pratt Manufacturing Company v. Jordan Iron and Chemical Company* (5 *N. Y. Civ. Pro.* 372); whilst on the contrary it was held that such a denial was authorized by the provisions of the Code, and is not frivolous, in *Lidgerwood Manufacturing Co. v. Baird*, 6 *N. Y. Civ. Pro.* 54; *Stent v. Continental Nat. Bank*, 5 *Abb. N. C.* 88; *Metraz v. Pearsall*, 5 *Id.* 90; *Henderson v. Manning*, 5 *N. Y. Civ. Pro.* 221; *Brotherton v. Downey*, 59 *How. Pr.* 206; *S. C.*, 21 *Hun*, 436; *Sheldon v. Sabin*, 4 *N. Y. Civ. Pro.* 4; *Macaulay v. Bromell and Barclay Printing Co.*, 5 *Id.* 431; *Musgrove v. Mayor*, 51 *N. Y. Super.* (19 *J. & S.*) 528; and *Marelay v. Sands*, 94 *U. S.* (4 *Otto*) 586. For a full review of the authorities see note in 15 *Abb. N. C.* 269; also 31 *Albany Law Journal*, 159.

After this array of authorities it would seem as if the question ought to be settled, and that no further discussion was necessary. Inasmuch, however, as the precise question does not appear to have been passed upon in this department or the court of appeals, we have concluded to examine briefly the provisions of the Code. Section 500 provides, that "The answer of the defendant must contain, first: A general or specific denial of each material allegation of the complaint con-

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troverted by the defendant, or of any knowledge or information thereof sufficient to form a belief." It will be observed that this section fails to prescribe the form of the denial ; it does not provide whether it shall be upon positive knowledge or upon information ; except in the event where he has no knowledge or information sufficient to form a belief, in which case it may be in that form. Section 3355 provides, that "for the purpose of determining the effect of the different provisions of this act with respect to each other, they are deemed to have been enacted simultaneously." The various sections of the Code are, therefore, to be construed together. Section 526 provides, that "The affidavit of verification must be to the effect that the pleading is true to the knowledge of the deponent, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true." Thus, by implication, the authority to plead upon information and belief is not only given in section 500, but in section 526 ; and section 524 provides, "The allegations or denials in a verified pleading must in form be stated to be made by the party pleading ; unless they are therein stated to be made upon information and belief of the party, they must be regarded for all purposes, including a criminal prosecution, as having been made upon the knowledge of the person verifying the pleading. An allegation that the party has not sufficient knowledge or information to form a belief with respect to a matter, must for the same purpose be regarded as an allegation that the person verifying the pleading has not such knowledge or information." If there was any doubt as to the authority to plead upon information and belief under the other section referred to, it would appear to be removed by the express provisions of this section ; and denials are placed upon the same footing with allegations. The allegations or denials

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in a verified pleading must in form be stated to be made by the party pleading, unless the allegations or denials are therein stated to be made upon information and belief of the party, &c. Under this section, the party pleading, if he has personal knowledge, is required to make his allegations upon personal knowledge, or if he is answering, and has personal knowledge of the subject-matter alleged in the complaint, his denial must be upon personal knowledge. If he has not personal knowledge, but has information upon which he has formed a belief, then the denials must be upon information and belief; or if he has not personal knowledge or information sufficient to form a belief, then his denial may be that he has not sufficient knowledge or information to form a belief; and any departure from this course would be perjury, and subject the pleader to a criminal prosecution. A construction of section 500 which would deprive a defendant of the right to make a general or specific denial upon information and belief, would in many cases deprive him of the right to put in issue the allegation of the complaint, or else, in his verification of the pleading, force him to swear to that which was not true. Take the case under consideration: the promissory note alleged in the complaint is alleged to have been made by the firm of which the defendant is a member. Either member of the firm had the power to make the note and sign the firm name. The defendant answering may have positive knowledge that he did not sign the note himself. He may have no knowledge as to whether or not it was signed by the other member of the firm. He may, however, have been informed by the other member of the firm that he had never signed or delivered such a note; having confidence in the statements of his copartner, he has information which he believes to the effect that the note was never signed by either of the firm. He could

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not truthfully say that he had no knowledge or information sufficient to form a belief, because he has been informed and believes that his copartner never signed the note. Can it be that it was intended to deprive him of the right to put in issue and raise the question as to whether or not the note was a forgery? We think not. To our mind section 524 makes clear his right to deny, upon information and belief, when he has such information and belief, and has not positive knowledge.

The order should be reversed and judgment vacated, with \$10 costs and disbursements. So ordered.

SMITH, P. J., and BRADLEY, J., concurred.

BARKER, J., not voting.

 ESTATE OF JOHN GRIFFITHS HENRY, DECEASED.

SURROGATE'S COURT, NEW YORK COUNTY, MARCH,
1886.

§§ 1310, 2570, 2584.

Surrogate's practice—Stay pending appeal—When appeal from order denying motion for commission does not operate as a—Order denying motion that separate issues be tried together, when not appealable.

Where, in a proceeding for the probate of an alleged will, the surrogate directed that the question as to the right of a contestant to be a party to the proceeding should be tried before the taking of testimony as to the making of the will,—*Held*, that an order denying a motion that such issues be tried together, did not involve a substantial right; that it was not appealable, and an appeal therefrom did not stay the proceedings.

An order made by a surrogate in probate proceedings, denying a

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motion for the issuance of a commission to take testimony without the State, is appealable, but an appeal from such an order does not operate to stay the proceedings.

(Decided March 17, 1886.)

Motion to postpone the trial of an issue in proceedings for the probate of an alleged will.

The surrogate having determined that issues arising in this matter as to the right of the contestant, Evan J. Henry, to be a party to this proceeding and as to the making and validity of the will, should be tried separately, and the trial of this later issue delayed until after the right of said Henry to be a party was determined, said Henry moved that the issues be tried together, and appealed from the order denying his motion. Application was also made for a commission to take testimony without the State to be used on the trial, which was also denied, and an appeal taken from the order entered thereon. When the cause was reached for trial in its regular order on the trial, said Henry moved to postpone the trial, claiming that the proceedings were stayed by the appeals which were then pending.

ROLLINS, S.—The procedure relating to appeals from decrees and orders of this court, is established by chapter 18, title 2, article 4 of the Code. Section 2570 provides that an appeal may be taken from any decree or from any order “affecting a substantial right.” It is declared by section 2584 that, except as otherwise expressly prescribed “a perfected appeal has the effect, *as a stay of proceedings, to enforce the decree or order appealed from*, prescribed in section 1310, with respect to a perfected appeal from a judgment.” By operation of section 1310, such an appeal effects a stay of all proceedings to enforce a judgment or order appealed from, “except that the court or

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judge from whose determination the appeal is taken may proceed in any matter included in the action or special proceeding, and not affected by the judgment or order appealed from or not embraced within the appeal."

Now I do not think that by force of the statute just quoted, the appeals which have been taken by Evan J. Henry from the two orders lately made by the surrogate have operated to stay the trial of this probate controversy which is now reached regularly on the calendar. The order denying the motion for the union of the issues theretofore directed to be separately tried, cannot be held to involve a "substantial right" within the meaning of section 2570. It affects mere modes of procedure that are entirely within the control of the trial court (*Arthur v. Griswold*, 60 *N. Y.* 143; *Whitney v. Townsend*, 67 *Id.* 40; *Miller v. Porter*, 17 *How. Pr.* 526).

The order denying the motion for the issuance of commissions is doubtless appealable (*Uline v. N. Y. Central R. R. Co.*, 79 *N. Y.* 175; *Wallace v. Am. Lin. Thread Co.*, 46 *How. Pr.* 403); but in what manner and to what extent, if at all, is the appeal which has been taken effectual as a "stay" within the meaning of section 1310? If the surrogate had made an order *granting* the application for commissions, it is clear that a perfected appeal would have operated to prevent their issuance; but an appeal from an order *denying* such an application does not, it seems to me, have practical operation as a stay at all.

It has never been held, so far as I can ascertain, that an appeal, either from an order denying or from an order granting a commission, accomplishes *per se* a suspension of the trial of the action or proceeding for the purposes of which the aid of the commission has been sought. The mischiefs that would result from such a practice can scarcely be over-estimated.

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The court of original jurisdiction would lose all control of its calendar. It would be utterly powerless to compel the trial of a cause, if it suited the pleasure of any of the parties thereto, even on the most frivolous pretext, to move for the issuance of a commission and to appeal from an order denying his motion. If such were the true state of the law, the fact would long since, I think, have been ascertained and promulgated. If the surrogate has erred in denying the contestant's application for the issuance of commissions, the error will be in due time corrected and the order of denial reversed. Besides, in case the trial of the cause shall now be directed to proceed, the contestant can except to that direction, and avail himself of that exception by appeal, in the event that a decree shall be hereafter entered adverse to his interests. The trial must proceed.

DOHERTY, ET AL., AS GRANTORS OF CHARLES
JONES, RESPONDENT, v. MATSELL, AND
ANOTHER, APPELLANTS.

SUPERIOR COURT OF THE CITY OF NEW YORK, GEN-
ERAL TERM. MARCH, 1886.

§§ 755-761, 1501, 1521-1523.

*Reviving and continuing action after verdict where party died before—
Action of ejectment brought in name of grantors.*

Where the grantee of lands held adversely to his grantors at the time of the conveyance to him, brought an action to recover said lands in the names of his grantors, and two of them died pending the action, and the defendant moved at the trial to dismiss the complaint on the ground that it had not been revived in the name of the executors of such deceased plaintiffs, which motion was denied and an exception taken, and the court at the close of the case directed a verdict for the defendant and ordered the exceptions of

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the plaintiff to be heard in the first instance at general term,—*Held*, that an order, granted after such trial, reviving and continuing the action in the name of the executors of the deceased plaintiffs and permitting the plaintiffs to amend the proceeding and “to amend and supplement their complaint showing the death of said plaintiffs and the qualification of their legal representatives, so as to conform to the proofs taken on the trial, *nunc pro tunc*” as of the day before the trial, was improperly granted; that the remedy for the defect was not to be found in sections 755 to 761 of the Code of Civil Procedure,—which provide for reviving and continuing actions in certain cases,—but was analogous to that which may be applied after an answer of a defect of parties, viz: to amend the complaint and proceed *de novo*, and that it would not be correct to allow such an amendment *nunc pro tunc*.

(Decided March 1, 1886.)

Appeal from order reviving and continuing action, etc.

This action was brought in the names of Mary Ann Doherty, Charles W. Doherty, James J. Doherty, Margaret A. Lauter, Mary A. Roche and Ellen T. Gavin, as grantors of Charles Jones, by said Charles Jones, to recover possession of certain real property, situate in East Eighty-third street, near First avenue, in the city of New York. The complaint alleged that the plaintiffs were on “April 13, 1883, and for a long time prior thereto, . . . the owners and seized in fee simple absolute, and entitled to the possession” of said premises; that at that time the “defendants were, and still are, in possession of said land and premises, claiming and pretending to hold such possession adversely, and now withhold the same from the plaintiffs and their said grantee;” that “the reasonable rental value of said premises is the sum of \$400 per annum, in which annual rent the plaintiffs and their grantee are damaged by said withholding by the defendant; that on or about April 30, 1883, the plaintiffs, by deed bearing date on that day, and recorded in the office of the register of the

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city and county of New York, in Liber 1726, of conveyances, at page 148, on May 12, 1883, duly granted and conveyed the said lands and premises to the said Charles Jones; that this action is prosecuted by the said Charles Jones pursuant to the provisions of section 1501 of the Code of Civil Procedure," and demanded judgment for the possession of said premises, and for \$1,000 damages.

Issue was joined December 5, 1883, and the action was tried November 6, 1885, before Mr. Justice TRUAX, and a jury, who, upon the close of the case, as presented by both sides, directed a verdict for the defendant and ordered the exceptions of the plaintiffs to be heard in the first instance at the general term, judgment in meanwhile to be suspended.

It appeared upon the trial before Justice TRUAX, from the testimony of one of the plaintiffs' witnesses, that Mary Ann Doherty and Margaret A. Lauter, two of the plaintiffs herein, had died pending the action and before the trial thereof; the former in January, 1885, and the latter in April of the same year, both leaving wills which had been admitted to probate and letters testamentary granted thereon.

The defendants moved at the close of the plaintiff's case to dismiss the complaint on the ground, among others, that the executors of said Mary Ann Doherty and Margaret A. Lauter, were necessary parties plaintiff, and the action should have been revived and continued in their names. The motion was denied, and an exception duly taken.

On November 19, 1885, an order was granted on the petition of Charles Jones requiring the defendants to show cause why the action should not be revived and continued as to the deceased plaintiffs in the name of their executors, and the complaint and summons amended, etc. This motion was subsequently (December 8, 1885), granted by Mr. Justice TRUAX, and an

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order entered, providing that the "action be revived and continued in the names of Charles W. Doherty, James J. Doherty and Walter Roche, the executors of the last will and testament of the deceased plaintiff Mary Ann Doherty, and Solomon D. Lauter, Charles W. Doherty, Henry Harrigan and James P. Campbell, executors of the last will and testament of the deceased plaintiff Margaret A. Lauter, and that the plaintiffs have leave to amend the proceedings herein, and amend and supplement their complaint, showing the death of said plaintiffs and the qualifications of their respective legal representatives, so as to conform the same to the proofs taken on the trial, *nunc pro tunc* as of November 5, 1885, upon payment to the defendants of \$5 costs."

From that order the defendants took this appeal. It appeared on the motion that one of the attorneys for the plaintiffs knew of the death of said Mary Ann Doherty and Margaret A. Lauter in June, 1885.

John C. Shaw (*T. H. Barowsky*, attorney), for defendants appellants.

Thain & Kearney, for plaintiff-respondent.

SEDGWICK, Ch. J.—On the first impression it would seem that in such a case the successor or representatives in interest of the deceased plaintiffs are not the executors of their wills, but their heirs or devisees. As no notice was taken of this on the argument, it may be presumed that in some way the executors are tenants in common with the surviving plaintiffs.

In *Hasbrouck v. Bruce* (62 *N. Y.* 483), the court of appeals said of a like case, that if the defect of parties had existed at the time of the commencement of the action, it would have been waived by the failure to take the objection in proper form. It does not proceed

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to say that when the death occurs after issue joined, the objection must be taken by an answer in the nature of a plea in abatement *puis darrien continuance*. It says that the objection having arisen since the commencement of the action, the only mode in which the defense could set it up was by objecting to the cause proceeding without bringing in the representatives of the deceased parties, and that such an objection should be sustained. It was also said that it was in the power of the court below to allow the defect to be remedied by amendment or supplement.

In my opinion, the remedy of the defect is not to be found in sections 755 to 761. They do not provide for a case where, in substance, the non-presence of a party as plaintiff is the ground for the remaining plaintiffs having no cause of action whatever, if the fact be pleaded or stated as an objection to proceeding.

The remedy is analogous to that which may be applied after an answer of a defect of parties. It is to amend the complaint and proceed *de novo*; it would not be correct to allow such an amendment *nunc pro tunc*, for in substance the amendment makes a new action, and the defendant should not be deprived of his right to plead that the substituted parties are not the proper representatives of the deceased plaintiffs.

In the present state of proceedings it is inexpedient, if not inadmissible, to order an amendment which will have the effect of disregarding the proceedings upon the trial and the verdict there directed for the defendant. It is not competent for this general term on appeal from this order to deal with the verdict, as can be done when the exceptions are brought on for argument. It cannot now be adjudicated that the defendants are not entitled to judgment upon the verdict.

I therefore think that the order below should be

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reversed and an order entered denying the motion, with \$10 costs to defendants, but without prejudice to a motion for amendment to be made after a determination of the exceptions to be argued at general term. The defendants are to have \$10 costs of the appeal in this action.

O'GORMAN, J., concurred.

BANNERMAN, RESPONDENT, v. QUACKENBUSH,
IMPLEADED, ETC., APPELLANT.

N. Y. COURT OF COMMON PLEAS, GENERAL TERM,
APRIL, 1886.

§§ 738, 1932.

Offer of judgment—When, by one of two joint debtors not as favorable as recovery.

Where, in an action against one J. E. Q. "and Son," as copartners, the defendant, J. E. Q., who alone was served with the summons, offered to allow judgment to be taken against himself, which offer was not accepted, and thereafter the action was tried and the complaint was amended by striking out the words "and son," and inserting the name of one "A. Q.," and the plaintiff recovered judgment against the defendants jointly, and against the defendant "J. E. Q." individually, for an amount which was not greater than the sum for which "J. E. Q." had offered judgment,—*Held*, that the recovery was more favorable to the plaintiff than the judgment offered, and the plaintiff was therefore entitled to the costs of the action.

Bannerman v. Quackenbush (7 N. Y. Civ. Pro. 428), affirmed.
(Decided April 5, 1886.)

Appeal by defendant from order of general term of city court of New York, affirming order of special term, directing new taxation of costs.

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The special term opinion is reported, 7 *N. Y. Civ. Pro.* 428. The order entered on it was affirmed by the general term (NEHRBAS, HYATT and BROWNE, JJ.), November 30, 1885, "on the opinion of the court below." Other facts are stated in the opinion.

William J. Leitch (*M. L. Hollister*, attorney), for defendant-appellant.

Edward J. Phillips (*Phillips & Avery*, attorneys), for plaintiff-respondent.

J. F. DALY, J.—Appeal by defendant John E. Quackenbush, from an order of the general term of the city court, affirming an order of the special term, upon appeal from taxation of costs by the clerk. The clerk had taxed costs in favor of plaintiff up to the time of the service of a written offer of judgment, and in favor of defendant, John E., after such offer. The special term directed full costs to be taxed in favor of plaintiff against said defendant.

This action was commenced on or about January 29, 1883, against "John E. Quackenbush & Son," as copartners (the complaint was amended on the trial by inserting the name of Abraham Quackenbush as co-defendant, and striking out the words "& Son"), to recover \$535.38, upon a copartnership indebtedness. John E. was the only defendant served with the summons. He answered separately and individually, setting up an off-set of \$471.61, and served an offer to allow judgment to be taken against himself for \$65.54 with interest and costs. The plaintiff did not recover a greater sum than was offered, but recovered against both defendants as copartners. The city court held that this was a more favorable judgment than that offered, because the offer restricted the plaintiff to the entry of judgment against John E. Quackenbush only.

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The defendant John E., claims that the offer authorized a judgment against both the joint debtors for the sum mentioned in it.

The first sentence of section 738 of the Code of Civil Procedure is identical with section 385 of the former Code, and provides: "The defendant may before trial serve upon the plaintiff's attorney, a written offer, to allow judgment to be taken against him for a sum or property, or to the effect therein specified, with costs." Under the former Code, it was held that one joint debtor, or one copartner, might make an offer, that the plaintiff should take judgment against the defendants, jointly liable, and if he were authorized to make such an offer by his co-defendants, or if there were a general appearance for all, or if the offer were made to secure a *bona fide* creditor, judgment might be entered upon the offer against all the defendants in form and enforced against their joint property and against the individual property of the defendant, served (*Olwell v. McLaughlin*, 10 *N. Y. Leg. Obs.* 316, Com. Pleas, Spl. T., DALY, J., 1852; approved in *Bridenbecker v. Mason*, 16 *How. Pr.* 203-207, Supreme Ct.; see also *Binney v. Le Gal*, 19 *Barb.* 598; S. C., 1 *Abb. Pr.* 283; *Emery v. Emery*, 9 *How. Pr.* 131).

It was also held that where one of two defendants jointly indebted, made an offer to plaintiff to take judgment against him, and his co-defendants were in default for want of an answer, and had not appeared, so that the plaintiff on receipt of the offer might at once enter judgment against both defendants, he must accept it or proceed at his peril as to future costs (*La Forge v. Chilson*, 3 *Sandf.* 752; *Bridenbecker v. Mason*, above).

The offer made by defendant John E. Quackenbush was not within any of the above authorities. His co-defendant was not in default and had not been served with process, and the offer was not made on

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behalf of the joint debtors but was an offer of judgment against himself alone. It was expressly held in *Everson v. Gehrman* (1 *Abb. Pr.* 167, Supreme Ct., First District, Gen. T., 1854), that such an offer authorized the entry of judgment against the defendant making the offer, but did not authorize a judgment against him and his copartner as joint debtors, and a judgment against both entered upon such an offer was set aside as irregular. If the effect of an offer by one of two joint debtors to allow judgment against himself is to authorize an individual and not a joint judgment, so that the plaintiff cannot have execution against the joint property, then it is of course an offer of a less favorable judgment than that which he recovers against both joint debtors in form. This was decided in the case of joint and several debtors where two out of four defendants offered to allow judgment against themselves separately (*Griffiths v. De Forest*, 16 *Abb. Pr.* 292, Supreme Ct., Gen. T., Third District, 1862).

The Code of Civil Procedure contains a provision not found in the former Code, by which one or more defendants in an action which can be severed may make the offer of a separate judgment. This provision was inserted to cover such cases as *Griffiths v. De Forest*, last cited, where the action is brought against defendants jointly and severally liable as to whom the action may be severed, and against whom separate judgments may be taken, but it has no reference to actions against defendants whose liability is joint, as in the case of copartners sued upon a copartnership debt.

It has been held, since the adoption of the Code of Civil Procedure, that there is no authority for one copartner to make an offer of judgment for the firm (*Garrison v. Garrison*, 67 *How. Pr.* 271, Schenectady Sp. T., 1884), and that no offer by one copartner is

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effectual without evidence that the other copartners approved or ratified it (*Weed v. Bergstrasser*, 2 *N. Y. Monthly Law Bull.* 55, Sp. T., First Dept., 1880), the latter decision following *Binney v. Le Gal*, above cited. But whether we hold that an offer of one joint debtor on behalf of all is as effectual under the present Code as under the former, we must hold, upon the authorities under the former Code, that the offer made by John E. Quackenbush to allow judgment against himself was not an offer of a joint judgment, and, therefore, not an offer of as favorable a judgment as plaintiffs finally obtained against him and his copartner.

It is urged that as the summons and complaint did not name Abraham Quackenbush as defendant, John E. was not bound to offer judgment against him, but it appeared from the answer of John E. that the goods for which the action was brought, were purchased by "defendant's firm," and his counter-claim was upon an indebtedness to "defendant's said firm," and he knew, therefore, that if plaintiff recovered, it would be against the firm, and that a judgment against one partner would not be as favorable as a judgment against all; and he was bound to make an offer that would embrace all the members of the firm whether they were named in the summons and complaint or not.

The order appealed from should be affirmed, with costs.

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THE UNITED STATES TRUST CO. RESPONDENT,
v. THE NEW YORK, WEST SHORE AND BUF-
FALO R. R. CO., RESPONDENT.
RUSSELL, AND ANOTHER, APPELLANTS.

§ 3320.

Receiver of corporation—Commissions of, appointed in foreclosure action.—Laws of 1883, chap. 378, to what receivers applicable.

The commissions of a receiver appointed *pendente lite* in an action to foreclose a mortgage executed by a corporation, are the same as those of a receiver in a foreclosure action where the mortgagor is an individual, and are governed by section 3320 of the Code of Civil Procedure, which provides that he "is entitled in addition to his lawful expenses to such a commission, not exceeding five per centum upon the sum received and disbursed by him, as the court by which or the judge by whom he is appointed allows."

The practice of the court of chancery as to the appointment of receivers in foreclosure actions, and the history of the jurisdiction of the court over insolvent corporations, and the appointment of receivers thereof stated.

Chapter 378 of the Laws of 1883, entitled, "An act in relation to receivers of corporations," does not apply to receivers of corporations appointed in foreclosure actions, but relates solely to receivers of corporations appointed in proceedings in insolvency.

(Decided March 2, 1886.)

Appeal by Horace Russell and Theodore Houston from an order of the general term of the supreme court in the second department, affirming an order of the special term, which fixed their fees, as receivers, at \$40,000, each.

This action was brought to foreclose a mortgage covering the "West Shore Railroad," and, by an order made in the action, June 9, 1884, Messrs. Rus-

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sell and Houston were put in possession of the railroad as receivers, and as such they operated it until November 11, 1885, the date of the order in question.

The mortgage which this action was brought to foreclose was given by the defendant, the New York, West Shore and Buffalo Railroad Company, to the plaintiff, on August 5, 1881. It did not purport to convey all the property of the mortgagor, but it did purport to convey that certain railway of the mortgagors known as the "West Shore Railroad" and extending from Weehawken to Buffalo, with branches from Cornwall Landing to Middletown, and with branches also to Albany and Rochester, constructed and to be constructed, together with all and singular all the "lands, tenements, hereditaments acquired or appropriated for the purpose of said railway and its several branches or either of them, and all easements thereunto belonging or in anywise appertaining, and all railways, rights of way, depot grounds, tracks, sidings, turnouts, bridges, viaducts, culverts, fences and other structures depots, station-houses, turn-tables, water-tanks, and other fixtures, car-houses, freight-houses, wood-houses, ware houses, machine-shops, store structures, building erections and fixtures of every kind and nature whatsoever, leaseholds, leases, rights under leases and under contracts, covenants and agreements, terms or parts of terms, now held or hereafter to be acquired for the use of said railway, its several branches or any of them, or in connection therewith or any business thereof; and also all locomotives, engines, fixtures, cars, and other rolling-stock and equipment now or hereafter to be acquired, and all rails, ties, machinery, tools, implements and material whatsoever, now held or hereafter to be acquired, and all other property, real, personal and mixed, now held or which may hereafter be acquired for or in connection with the construction, operation and maintenance, reparation or

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replacement of the said railway, its several branches, or any part thereof, or as convenient, or necessary, for the use or purposes thereof, and all right, powers, privileges and franchises, now held or to be hereafter acquired by the said party of the first part connected with or relating to the said railway or its several branches or any of them, or the uses or purposes thereof; and also all corporate franchises of every name and nature relating to said railway, including the franchises to operate the said railway, together with all improvements or additions made or to be made to any or all of said property, estates, railroads, or railways and their appurtenances which the said party of the first part owns and holds, or may and shall hereafter acquire, or hold necessary or convenient for use, occupation, and enjoyment of all or any of the said railways, leases and property rights, privileges and franchises, or any part or portion thereof."

On June 7, 1884, the plaintiff brought this action against the defendant railway company alone, to foreclose that mortgage, alleging a default in the payment of \$3,500 of interest due January 1, 1884, and the non-payment of taxes and assessments which the mortgagor had agreed to pay.

On the same day, by an order of the special term of the supreme court, Messrs. Russell and Houston were "appointed receivers to take possession of the property, real and personal, railroad, road-bed, iron ties, lands, rights of way, easements, rolling-stock, equipments, leases, rights under leases, franchises and all other rights and property whatsoever, of the defendant, wherever the same may be found, covered by the mortgage or deed of trust made by said defendant to the plaintiff, dated August 5, 1881, and referred to in the complaint in this action, with power to hold, preserve, manage, control and operate said railroad and other mortgaged property, and, under the direction of

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this court, to defend all suits brought against them." They qualified, and took possession of the West Shore Railroad on June 9, 1884, and have operated it since, until the granting of the order appealed from, and on October 1, 1885, final judgment of foreclosure and sale was entered.

During the sixteen months of their receivership, the appellants received \$14,979,205.93. The court allowed them each \$40,000, on the basis of the salaries (\$25,000 per year), given to the presidents of the largest railroads.

From this order they appealed to the general term, claiming \$750,000 by virtue of Laws of 1883, chap. 378; and, the general term having affirmed the order, they took this appeal.

William G. Choate and Elihu Root (P. B. McLennan, attorney), for receivers, appellants.

Joseph H. Choate and Edward W. Paige, for respondents.

D. O'Brien, attorney general.

ANDREWS, J.—The Code of Civil Procedure, which was in force when the proceedings in this action were taken, furnished the general rule governing the allowance of commissions to receivers. It is found in section 3320, which provides as follows: "§ 3320. A receiver, except as otherwise specially prescribed by statute, is entitled, in addition to his lawful expenses, to such a commission, not exceeding five per centum upon the sum received and disbursed by him, as the court by which, or judge by whom he is appointed, allows."

The judge at special term in substance held that this section governed the allowance of commissions in the case, and made an order fixing the commission of

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receivers at a gross sum, less than five per centum upon the sums received and disbursed. The order of the special term was affirmed by the general term, and the only question presented on this appeal is as to the application of section 3320, to the case of a receiver *pendente lite*, appointed in a foreclosure action, to foreclose a mortgage executed by a corporation. It is plain that the section is applicable to receivers appointed in foreclosure actions, where the mortgagor is an individual. But it is claimed that the case of a receiver appointed in a foreclosure, acting against a corporation is taken out of the general rule of law by force of section 2, chapter 378, of the laws of 1883, and that by that section such a receiver is entitled to a fixed percentage, upon receipts and disbursements, which the court is bound to allow, irrespective of any consideration of the character or value of the services rendered.

The act of 1883, is entitled "An act in relation to receivers of corporations." The second section, upon the appellants reply, is as follows: "§ 2. Every receiver shall be allowed to receive as compensation for his services as such receiver, five per cent. for the first \$100,000 actually received and paid out, and two and one-half per cent. on all sums received and paid out in excess of the said \$100,000." We have reached the conclusion that the appellants were not "receivers of corporations" within the meaning of the act of 1883, and shall content ourselves with a brief statement of the reasons for our judgment. The power of a court of chancery to appoint a receiver *pendente lite* in foreclosure cases is a part of its incidental jurisdiction, not depending upon any statute and which it exercises whenever, by reason of insufficiency of the security, or other reason, equity required that the rents and profits of the mortgaged property, pending the litigation, should be impounded and retained,

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to be applied upon the debt, to be ascertained by the final judgment (*Hollenbeck v. Donnell*, 94 *N. Y.* 342).

The receiver, by virtue of his appointment, took possession of the mortgaged property and received the rents and profits as the officer of the court, but the title to the property was not changed but remained in the mortgagor until a sale under the decree in the action (*Keeney v. Home Ins. Co.* 71 *N. Y.* 396). This jurisdiction, was not affected by the character of the mortgagor, whether an individual or a corporation. It rested upon grounds quite independent of the character of the parties to the instrument or the nature of the mortgaged property. But it was held, at an early day in this state, that the jurisdiction of chancery did not extend to the sequestration of the property of a corporation by means of a receiver, or to the winding up of its affairs, or to control or restrain the usurpation of franchises by corporate bodies, or by persons claiming, without right, to exercise corporate owners (*Attorney-general v. Utica Ins. Co.*, 2 *Johns. Ch.* 371; *Attorney-general v. Bank of Niagara*, 1 *Hopk.* 354). The refusal of the court of chancery to entertain jurisdiction of corporate bodies at the instance of creditors, or to wind up their affairs in case of insolvency, led to the enactment by the legislature in 1825 of the act, chapter 325 of the laws of that year, entitled "An act to prevent fraudulent bankruptcies of incorporated companies and to facilitate proceedings against them," etc. By this act jurisdiction was conferred upon the court of chancery to sequester the property of a corporation upon the application of a judgment creditor, after the return of an execution unsatisfied, and to appoint a receiver of its property (§ 15), and in case of an incorporated bank, which had become insolvent or had violated its charter, it authorized the court of chancery, upon the petition of the attorney-general, or of a creditor, to proceed by injunction and to appoint

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a receiver of the property of the bank, and to distribute the same among its creditors (§ 17). The provisions of the act of 1825, enlarged and extended, were incorporated into the Revised Statutes in the article entitled "Of proceedings against corporations in equity" (2 *R. S.* 462), and a complete statutory system for the winding up of the affairs of a corporation, against which an execution had been returned unsatisfied, at the instance of the creditors in the execution and for similar proceedings insolvent banking or other specified corporations at the instance of the attorney-general or any creditor or stockholder (§§ 36, 39, 40, 41). The court was authorized to appoint a receiver of the corporate property. Their powers and duties are specified in the statute in great detail, and it is declared that receivers so appointed shall be vested with all the estates, real and personal, of such corporations, "and they are declared to be trustees of such estate for the benefit of such corporation and its stockholders" (2 *R. S.* 469, §§ 67, 68). The system inaugurated by the act of 1825 and incorporated into the Revised Statutes has been continued by the Codes, and for fifty years prior to the act of 1883 had been the statutory system of procedure for the winding up of affairs of insolvent corporations, through receivers appointed by the court, not by virtue of its inherent jurisdiction, but under statutory authority. The statute which authorized their appointment also prescribed with great minuteness, their powers and duties. The immediate point in controversy is whether the act of 1883 was an additional regulation, prescribing the rights and duties of receivers of insolvent corporations, or has a wider scope embracing all receivers of a corporation or of corporate property, however appointed, or for whatever purpose the appointment may have been made. We think the limited construction of the statute is the true one, and that the general language

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of the second section, prescribing the fees of receivers, must, in view of the context be construed as relating only to receivers of insolvent corporations. The act is made up mainly of provisions of chapter 537, of the laws of 1880, and the subsequent amendments of 1881 and 1882 (*Laws of 1881*, ch. 639 ; *Laws of 1882*, ch. 331), and those acts expressly relate to receivers of insolvent corporations. The first section is new, and in substance is a legislative enactment of the Supreme Court Rule, No. 81, and prescribes that an application for the appointment of a receiver of a corporation shall be made in the judicial district in which the principal business office of the corporation is located, or in a county adjoining such district. This section makes no reference to the nature of the proceedings in which the application is made. But a reference to the ninth section shows that proceedings against insolvent corporations only were in contemplation. The ninth section declares that all applications to the court, contemplated by the act, shall be made in the judicial district where the principal office of the insolvent corporation was located. The other sections provide for orders and proceedings of various kinds. If the nature of the proceedings to which the act relates is left indefinite by any of the other sections, the obscurity is removed by the ninth section, which shows that the legislature was dealing with insolvent corporations, and that the orders to be made were in a proceeding against such corporation only. The second section is one prescribing the fees. The third section provides that the order appointing the receiver shall designate the place of deposit of the funds of the corporation, and that they shall not be deposited elsewhere, except upon the order of the court, on notice to the attorney-general. The application for an order changing the place of deposit, must, according to the ninth section, be made in the judicial district where

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the principal office of the insolvent corporation is located. The third section, therefore, relates to a proceeding against an insolvent corporation, for it is only in such a proceeding, as appears by the ninth section, that an order is contemplated. The fourth section makes it the duty of the receiver of an insurance, banking or railroad corporation, to make and file periodical accounts every six months; prohibits his paying to any attorney or counsel any costs, fees, or allowances, until the amounts shall have been stated and approved by the court by an order duly entered, and requires notice of the presentation of any such accounts, to be given to the attorney-general, who is also required to examine the books and accounts of the receiver at least once every twelve months; provisions very appropriate to a receivership for winding up the affairs of a corporation. It is not questioned that the remaining sections of the act from 5 to 10, both inclusive, relate exclusively to proceedings against insolvent corporations. We think that the preceding sections relate to the same subject. It is matter of public notoriety that the act of 1883 was passed in view of the scandals which had been set afloat in respect of the administration of the affairs of insolvent corporations through receivers. Omitting the second section, it is, we think, reasonably clear that the object of the act was to supplement the existing legislation in respect to the winding up of the affairs of insolvent corporations, and to provide further restriction and safe-guards against the misuse or depletion of corporate funds in the hands of receivers. The second section dealt with a subject germane to the purpose of the act and fixed the compensation of the receiver, and when it used the language "every receiver," it is, by the ordinary rules of interpretation and construction of statutes, to be restrained to the particular subject with which the legislature was deal-

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ing, and to which the section in question had an appropriate application (See *Smith v. People*, 47 *N. Y.* 330 ; *People ex rel. Mason v. McClave*, 99 *Id.* 83).

The conclusion is, that the act of 1883, including the second section, relates exclusively to receivers of corporations, appointed in proceedings in insolvency.

The order should, therefore, be affirmed.

All concurred.

PATTERSON, RESPONDENT, v. McCUNN, ET AL.,
APPELLANTS.

SUPREME COURT, FIRST DEPARTMENT, GENERAL
TERM, JANUARY, 1886.

§§ 1301, 1303, 1316.

*Notice of entry—Service of—Indorsement thereon of attorney's address—
Effect of admission of due and proper service—Notice of
appeal—Amending.*

Where a copy of a judgment and notice of its entry signed with the plaintiff's attorney's name without his address, were served upon the defendant's attorney, who admitted "due and proper" service thereof, and also of a notice to attend before a referee appointed by the judgment,—*Held*, that the defects in the notice were cured by such admission, and the defendant's time to appeal from the judgment was limited by such service.

While all papers must be indorsed and subscribed with the name and address of the attorney or attorneys, and their post-office address, and place of business, and a party who undertakes to limit the time for appealing must be held to strict practice, and a notice of judgment which does not conform in all respects to the rule is a nullity and may be treated as such ; the failure of an attorney to state upon a notice of entry of judgment his address, is cured by a formal admission of "due and proper" service thereof.

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The court cannot amend a notice of appeal from a final judgment by inserting therein a specification that it is intended, on such appeal, to review an interlocutory judgment, the time to appeal from which has expired; such an amendment would be in effect an extension of the time to appeal.

(Decided January 9, 1886.)

Appeals by the defendants John and Jane W. Gano, from an order of the New York county special term, denying motion to amend notice of appeal, and for leave to file exceptions *nunc pro tunc*.

Alfred Taylor, for defendants-appellants.

Christopher Fine, for plaintiff-respondent.

BRADY, J.—This action was brought by the plaintiff as one of the heirs at law of John H. McCunn, deceased, for the purpose of having declared void the fifth clause of the will of the decedent and a codicil thereto under which the appellants, who were infants, derived their interests, and for a partition of the real estate attempted to be devised thereby.

On July 1, 1880, an interlocutory judgment was entered *nunc pro tunc* as of January 25, 1878, declaring void the clause and codicil mentioned, and on November 1, 1881, a final judgment was entered decreeing the sale of the real estate affected by the clause and codicil. On December 12, 1881, an appeal from the final judgment was taken by the attorney for Mr. Bachman, who was the guardian *ad litem* of the appellants, and a due admission of service of the notice of appeal was given. There was no notice of appeal, however, from the interlocutory judgment served until February 4, 1885, and until after a substitution of Messrs. Taylor & Parker, as attorneys for the guardian. On January 14, 1885, Taylor & Parker were substituted and on February 16, following, Mr. Bachman

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resigned. When the notice of appeal from the interlocutory judgment was served, it was returned on the ground that Messrs. Taylor & Parker, were not the then attorneys of Bachman ; that the notice of appeal, and exceptions were not served within the time required by law, and the case which was served by them with the notice of appeal was not in due and proper form.

Subsequent to the resignation of Mr. Bachman, already mentioned, an order was made appointing Frederick S. Parker, guardian *ad litem* for the appellants, and they made application that the order of substitute of January 4, 1884, the notice of appeal from, and exceptions to the interlocutory judgment, the proposed case on appeal, and the order appointing Frederick S. Parker guardian *ad litem* be declared legal, and service thereof, valid and that the court grant him leave to file exceptions to the findings and conclusions of law *nunc pro tunc*. The motion was denied upon the ground that the appeal from the interlocutory judgment was not taken within the time prescribed by law and on the further ground that the notice of appeal from the final judgment made no reference to the interlocutory judgment, and, therefore, did not bring it up for review.

Upon the motion it was insisted that the notice of the entry of the interlocutory judgment was invalid, for the reason, that the attorney's name was signed without his post-office address, as required by rule 2 of this court, and which proposition, it was insisted, if correct, preserved his right to appeal from the interlocutory judgment.

It was also claimed that, even if this view was erroneous, under the provisions of section 1303 of the Code, a notice of appeal having been served, the court had the power, by amendment, to supply any omissions, including even that to mention the appeal from

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the interlocutory judgment, as contemplated by section 1316, of the Code of Civil Procedure.

It is provided by rule 2*, of this court that all papers must be indorsed and subscribed with the name of the attorney or attorneys, and their post-office address and place of business. And it has been determined that a party who undertakes to limit the time for appealing must be held to strict practice, and that a notice of judgment which does not conform in all respects to the rule is a nullity, and may be treated as such (*Yorke v. Peck*, 17 *How. Pr.* 192; *Kelly v. Sheehan*, 76 *N. Y.* 325; *Kilmer v. Hathorn*, 78 *Id.* 228). But unfortunately for the successful application of this rule the guardian *ad litem*, who was the attorney in person as well, admitted the due and proper service of the interlocutory judgment upon September 14, 1880, and also due and proper service of a summons to attend before the referee appointed pursuant to that judgment on September 30, following.

The counsel for the appellants endeavors, with ingenuity, to overcome the effect of this admission, taking the ground that it was only to prevent any question as to the method of service, or that the service was not requisite on them at the time, and that it would be a perversion of language to hold, that by admitting service of the paper, a material addition was admitted which was necessary to its validity, and that a party should only be held to admit the service of the paper actually served, be the effect what it may, and still further, that an admission of due service of a paper which was a nullity, would be the service of it as a nullity and nothing more.

There might be some force in this view, if the

* The portion of the section of the General Rules of Practice here referred to is as follows: "All papers served or filed must be indorsed or subscribed with the name of the attorney or attorneys, and his or their office address, or place of business."

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admission had not extended further, as we have seen it did, namely, admitting service of a summons to attend before the referee appointed pursuant to the judgment. This was undoubtedly a waiver of any defect in the service of the notice, and it would be unjust, after a party had received a notice of the judgment which did not in all respects comply with the rules of court, to allow him to take the advantage of the proceedings under the judgment of which he was advised and to which his notice was called by a contemplated action under it.

He should have advised the attorney for the successful party of the error. But the effect of the admission of service deprives the appellants of any results that might flow from the considerations suggested, because the admission, as we have seen, is not only of due, but of proper, service of a copy of the interlocutory judgment. The word proper here, covers every thing and disposes of the strenuous efforts made by the counsel for the appellants to secure the advantages, which, under the decisions referred to, might arise from the imperfect notice of the entry of the judgment which was served. It must be held, therefore, that the learned justice in the court below, was right in holding that no appeal was ever taken from the interlocutory judgment, and that the failure to state the post-office was an error which was plainly cured by the formal admission to which attention has been called, and particularly when it is considered that there ~~was~~ an admission, also signed by the guardian *ad litem*, of the due and proper service of the final judgment not only as guardian *ad litem* but as attorney for the appellants.

Although the appellants omitted to appeal within the proper time from the interlocutory judgment, they might have secured all rights by an appeal from the final judgment, if the notice of appeal had conformed

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to the provisions of sections 1301 and 1316 of the Code. But, unfortunately for them, the notice of appeal from the final judgment makes no reference to the appeal from the interlocutory judgment, and in such a case the interlocutory judgment, as to all points covered by it, is to be taken as the settled law of the case, and is not open to review upon the appeal (*Code of Civil Procedure*, §§ 1301 and 1316; *Reese v. Smyth*, 95 *N. Y.* 645, 646).

The application, so far as it relates to the amendment of the notice of appeal, under the provisions of section 1303 of the Code of Civil Procedure, must fail also, because it was not necessary to do anything to affect the appeal from the final judgment, except perhaps to serve upon some of the defendants in the action the notice of appeal. So far, it might be successful under the provisions of that section. But the power of amendment does not extend to the insertion in the notice of appeal of a specification of the interlocutory judgment. That, in effect, would be enlarging the time to appeal which the courts have not the power to do (*Lavalle v. Skelly*, 90 *N. Y.* 546, 548; *S. C.*, 24 *Hun*, 642; *Clapp v. Hawley*, 97 *N. Y.* 610; *Piper v. Van Buren*, 27 *Hun*, 384).

In the last case cited, the general term said that the provision of the Code contained in sections 1301 and 1316, made it a condition precedent, in order to review an interlocutory judgment, that the appeal from the final judgment distinctly specify the interlocutory judgment, and that such a specification was essentially a condition precedent to the right to exercise the second opportunity to appeal. The disposition, therefore, of the second proposition contained in the decision of the court below, is correct, namely, that the notice of appeal from the final judgment did not refer to or bring up the interlocutory judgment, and that the question sought to be reviewed could not, there-

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fore, be brought up ; nor could the court review the case and exceptions where no appeal was taken from the interlocutory judgment within the time required by law. This is all it is considered necessary to discuss in this case, because without the amendments asked for the appeal would be of no use to the appellants ; and the views expressed therefore dispose of all the vital questions presented by the record. If the provisions of the Code, and the decisions relating to them did not offer any insuperable difficulties, there would be a strong disposition upon the merits to grant all amendments necessary to give the appellants an opportunity to review the determination of the court. It seems to have been lost by negligence or inattention.

The judgment and order appealed from must, therefore, be affirmed, but without costs.

DAVIES, P. J., and DANIELS, J., concurred.

ROTHWELL, RESPONDENT, v. PAINE, ET AL.,
APPELLANTS.

N. Y. COMMON PLEAS, GENERAL TERM, JANUARY,
1886.

§§ 549, 550, 559.

Undertaking on arrest—When right of action accrues on—What does not release sureties.

In an action against the sureties on an undertaking in arrest, it appeared that plaintiff was arrested in an action in the superior court, the order stating the ground to be, the perpetration of a fraud and a breach of trust, and a failure to pay over moneys received in a fiduciary capacity ; that the order was subsequently

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vacated upon grounds not appearing here, and such decision was affirmed by the general term of the superior court, and was apparently acquiesced in by the plaintiff in that action; and subsequently, upon the trial thereof, such plaintiff, upon a motion being made to elect between several causes of action alleged to be set forth in his complaint, consented without an order, in open court, to eliminate from the complaint the charges of fraud, &c., leaving only an action for money had and received in a fiduciary capacity, and for an accounting,—*Held*, that, whether the ground of arrest was identical with the cause of action or extrinsic thereto, the effect of the order vacating the order of arrest followed by the consent in open court, was to complete plaintiff's right of action on the undertaking; that the fact that the complaint was by order amended to conform to the stipulation, without the consent of the sureties, does not relieve them from liability; nor does the fact that the undertaking was several, they being sued according to its terms.

If it is finally decided that the plaintiff in an action in which an order for the arrest of the defendant was granted and executed, "was not entitled to an order of arrest," the sureties on the undertaking given to procure it are liable, and it is immaterial on what ground the order of arrest was set aside or whether it was properly granted. (*Decided February 1, 1886.*)

Appeal by defendant from a judgment of the general term of the city court of New York, affirming a judgment of the trial term in favor of the plaintiff.

The opinion states the facts.

Abram Kling, for respondent.

James H. Fay and *Edward M. Shepard*, for appellants.

BOOKSTAVEN, J.—The action was brought to recover damages on an undertaking, executed by the defendants, as sureties, upon the granting of an order of arrest against the plaintiff, in an action brought against him by one Tuttle, in the superior court of the city of New York.

The ground for arrest, as stated in the order, was

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“the perpetration of a fraud on the plaintiff, by defendants ; and a breach of trust and failure by the defendants to pay over moneys received by them in a fiduciary capacity.”

Under this order the plaintiff was arrested, and gave bail. Afterwards the order of arrest was vacated on motion, and, an appeal having been taken to the general term, the order vacating the order of arrest was affirmed on June 2, 1883 ; and the plaintiff in that action has apparently acquiesced in such affirmance.

The ground on which the order of arrest was vacated, does not appear from the record. Although the complaint as it then stood did not, in terms, set forth several causes of action, the superior court may have held that three distinct causes of action were in reality, contained in it ; one for fraud, another for money had and received in a fiduciary capacity, and a third for an accounting—that is, one in which the nature of the cause of actions gives the right to the order of arrest ; one in which the right to the order of arrest depends on facts extrinsic to the cause of action ; and a third, in which ordinarily no order of arrest could be obtained, and, because they were joined in one action, no order of arrest would lie under *Madge v. Ping* (71 *N. Y.* 608) ; *American Union Tel. Co. v. Middleton* (80 *Id.* 408) ; *Young v. Weeks* (7 *Daly*, 115) ; *Smith v. Knapp* (30 *N. Y.* 581), and other cases. Or it may have been because the undertaking given by these defendants, upon the order of arrest, was several and not joint and several. But it is not necessary for us to determine on what ground the order of arrest was set aside, nor whether it was properly vacated. This is certain, that the superior court finally decided that the plaintiff in that action “was not entitled to the order of arrest,” and one of the two contingencies in the undertaking happened, which gave the plaintiff in this action, a right of action against the defendants.

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In arriving at this conclusion, we do not overlook *Schuyler v. Engbert* (10 *Daly*, 463); nor *Staabe v. Shupe* (*Daily Register*, Nov. 17, 1884).^{*} These properly decided that in cases where the nature of the cause of action gives the right to the order of arrest, this right is determined by the fact that the plaintiff obtains judgment; and the right to sue on the undertaking, does not arise until final judgment, as is the case in undertakings upon injunction.

The complaint, in the superior court action, mingled several causes of action; and that court, for reasons that do not appear, finally decided that the plaintiff in that action was not entitled to the order of arrest. We cannot review the decision of that court, and it must be deemed to be the law as between the parties to that action and their privies.

But this action was not prematurely brought for another cause. The superior court action came to trial on November 7, 1883. The counsel for the defendants moved that the plaintiff be compelled to elect on which of three causes of action, alleged to be in the complaint, he would rely; and thereupon, in open court, apparently without the order of the court, he consented to strike out from the complaint the 6th and 7th clauses, and a part of the 9th, which entirely eliminated the charges of fraud and left only an action for money had and received in a fiduciary capacity, and for an accounting in regard to the same.

The defendant's attorney did not consent that the part of the 9th clause of the answer should be stricken out at that time; but on December 12, 1883, after the commencement of this action, it was stricken out on motion as irrelevant and immaterial. If it was irrelevant at any time, and could be stricken out, it must have been so immediately on giving the consent to

^{*} S. C., 1 *How. Pr. N. S.* 4.

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strike out the 6th and 7th clauses of the complaint, and consequently did not present any charge of fraud for trial.

The consent, striking out the allegation of fraud, excepting the irrelevant ones in the 9th clause, was made in open court and became a part of its record. Both the court and the parties to the action acted on it by proceeding with the trial.

On November 23, 1883, an order was entered at trial term in the superior court, before the same justice who tried the cause, reciting the consent or stipulation before mentioned, and amending the complaint in pursuance thereof. This was merely declaratory of the effect of the consent given on the trial, and added no new force or effect to such consent.

The cause of action for fraud having been eliminated from the case, by consent, in open court, on November 7, 1883, and it having been finally decided that the plaintiff was not entitled to the order of arrest before that time, it follows, that in any view of the case the present plaintiff's right of action was complete when he commenced this action on November 12, 1883.

The minutes of trial in the superior court action, and the orders of November 23, December 12, 1883; the papers on which they were founded, and the final amended complaint, were admitted in evidence to show that the cause of action founded on fraud had been abandoned on November 7, 1883, and before the commencement of this action; and as the complaint expressly avers this, and it was one of the issues in the case, we think they were properly admitted.

The defendants must be held to have executed the undertaking, in contemplation of the right of the superior court to make its own record, and to amend the pleadings in the action by consent, or in any other

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lawful manner; and the fact that the complaint was amended without their consent cannot avoid them.

The fact that the undertaking was several, and not joint and several, does not relieve the defendants. They have been sued severally, according to the terms of their undertaking.

The judgment should be affirmed, with costs.

LARREMORE, P. J., and ALLEN, J., concurred.

McELROY, RESPONDENT, v. BAER, AND ANOTHER,
APPELLANTS.
HOWE, RESPONDENT.

N. Y. COURT OF COMMON PLEAS, GENERAL TERM,
FEBRUARY, 1886.

§ 820.

Interpleader—When common law remedy—Practice, when ordered in district court.

Interpleader under the statute (Code of Civil Procedure, § 820), is not in the nature of a suit in equity, but a remedy designed for use in common law courts, and is a measure of relief to which suitors in a district court in the city of New York may resort.

Where interpleader is ordered in a district court in the city of New York, there should be served upon the party brought in by the interpleader, a copy of a complaint and of the order directing the interpleader, which should require him to appear and answer the complaint in the same time that a defendant is required to answer a summons, and should provide that the money in court be paid to the plaintiff in case of the failure to appear and answer of the party who is interpleaded; if the party appears and answers, the issues raised may be tried by the court, unless a jury is demanded at the

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time of the joinder of issue, and upon the entry of judgment, the money must be paid to the prevailing party unless an undertaking sufficient to stay proceedings be given, and costs should be awarded against the losing party.

Lawrence v. Wilson (8 *Hun*, 593), followed.
(Decided February 1, 1886.)

Appeal from judgment of the district court in the city of New York, for the sixth judicial district.

This was an appeal from the sixth district court. The action was brought originally against J. Morgan Howe to recover for broker's commission on the sale of a house and lot in this city. Morris B. Baer and Morris B. Bronner, composing the real estate firm of Morris B. Baer & Co., had also claimed the same commission. Howe obtained an order to show cause why they should not be substituted as defendants in his place. This motion was opposed, both by plaintiff and Baer and Bonner, and was granted, upon which Howe paid the fund in dispute into court. After the interpleader thus made, Baer and Bonner failed to answer; the plaintiff took judgment by default, and the deposit was paid to him. Baer and Bonner then appealed. The point raised was, the invalidity of the interpleader.

W. T. Birdsall, for substituted defendants, appellants.

John C. Gulick, for original defendant, respondent.

Frederick R. Lee, for plaintiff-respondent.

PER CURIAM.—It is settled by the decision of this court in *Rauch v. Dreyer* (3 *Daly*, 434), and *Baer v. Benner* (2 *N. Y. Civ. Pro.* 362), that the statutory interpleader, which is not in the nature of a suit in equity,

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but a remedy designed for use in common law courts (see the English Statute entitled 1 & 2 Wm. IV., ch. 58; 23 & 24 Victoria, ch. 126), is a measure of relief to which suitors in a district court in the city of New York may resort. It is to be regretted that when the framer of section 123 of the Code of Procedure borrowed from the English statutes that we have mentioned, the idea of permitting the defendant in an action at law to obtain, in a summary way in that action, the same relief that he might obtain by filing a bill of interpleader in a court of equity, he did not at the same time borrow the procedure which those statutes created.

The consequence of borrowing only the relief and omitting to provide a way by which that relief can be attained, has been to throw upon the courts of this State the necessity of framing for themselves a system of practice that will make the statutory interpleader effectual. One of the first efforts in that direction was made in the case of *Van Buskirk v. Roy* (8 *How. Pr.* 425), in which the court directed that the order should provide that if the party interpleaded did not appear and defend the action within twenty days after the service upon him of a copy of the order of interpleader the money in court should be paid to the plaintiff. The Code nowhere provided for these proceedings, but they were adopted because in no other way could effect be given to the intent of the legislature in creating the remedy of an interpleader, in a common law action. Perhaps the action of the court might be called judicial legislation.

Again, in *Lawrence v. Wilson* (8 *Hun*, 593), the court said: "As the Code prescribes no mode of proceeding under this section, the practice under it should be, I think, as far as practicable, that adopted by the courts of equity in case of interpleader in analogous cases." The court then recommended that the prac-

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tice be such as is suggested by *Moak's Van Santvoord's Pleadings*, page 358.

We see the wisdom of the course recommended by the court in the case last cited, and are of the opinion that in the district courts after the order of interpleader is made, a copy of the order and a copy of a complaint drawn in conformity with the suggestion made in *Moak's Van Santvoord's Pleadings* should be served upon the party brought in by the interpleader. The order should require him to appear and answer the complaint in the same time that a defendant is required to answer a summons, and should provide that the money in court shall be paid to the plaintiff in case of the failure to appear and answer of the party who is interpleaded. If the party appear and answer, the issue raised may be tried by the court, unless a jury be demanded at the joinder of issue. Upon the entry of judgment, the money must be paid to the prevailing party, unless an undertaking sufficient to stay proceedings be given, and costs should be awarded against the losing party. It may be that Baer and Bonner intentionally abandoned the case when the district court decided that they should be brought in by interpleader, but we are not able to say that such was their intention. It is possible that they left the court because they did not expect any further proceeding without some further notice. We prefer to place that interpretation upon their acts, because they have not as yet had an opportunity to show their rights to the money in controversy.

Of course, Dr. Howe is discharged from all liability, and he has no interest in, or concern with the litigation that followed or may follow the payment by him of the money into court. We think it proper to reverse the judgment and order a new trial, with costs to abide the event.

Let the district court amend its order so that Baer

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and Bonner shall answer in the usual time. Then let the plaintiff serve upon them a new complaint drawn in conformity with the suggestions already referred to. If Baer and Bonner fail to appear and answer, let judgment be entered establishing the right of plaintiff to the money. If they appear and answer, let the issue be tried and the money awarded to the prevailing party.

The reversal of the judgment leaves the plaintiff without any adjudication in his favor as to his right, and exposes him to liability to an action to be brought against him by Baer and Bonner for the money that was paid to him under the judgment that has been reversed.

Judgment reversed and a new trial ordered as between the plaintiff and Baer and Bonner, with costs to abide the event.

LARREMORE, ALLEN and BOOKSTAVEN, JJ., concurred.

CRONIN v. CRONIN.

CITY COURT OF NEW YORK, SPECIAL TERM, FEBRUARY, 1886.

§§ 820, 3228, 3230.

Costs in action where interpleader ordered on motion—When discretionary.

Where an interpleader is ordered on motion, made under section 820 of the Code of Civil Procedure, the costs of the action are in the discretion of the court.

The action of interpleader is of equitable origin, and the remedy provided by the Code of Civil Procedure is merely concurrent; the

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principles which govern the remedy, either in equity or under the Code, are alike, and the rule formerly prevailing as to costs should as far as practicable be applied to the present practice.

Where money was deposited in a savings bank, to the credit of a husband and his wife "or either," and the wife, claiming the entire deposit, brought suit against the bank therefor, and the bank secured an order interpleading and substituting the husband as defendant, in its place, on the ground that he also claimed the same fund, and both the husband and the wife established title to a substantial part of the fund in dispute,—*Held*, that the award of costs rested entirely in the discretion of the court; that neither party should recover costs against the other out of the fund, but that the disbursements of each party should be taxed and charged upon the fund.

(*Decided February 6, 1886.*)

The Bank for Savings had on deposit to the credit of Mary Cronin and her husband, Joseph, or either, the sum of \$747.98. The plaintiff brought an action against the bank, claiming the entire deposit, and the bank moved for and obtained an order interpleading in its place the present defendant, on the ground that he also made claim to the same fund (*Mulcahy v. Emigrant Industrial Savings Bank*, 89 *N. Y.* 435). The bank, under this order, was allowed to retain the fund at interest, subject to the further order of the court, leaving the rival claimants to establish their title to it. The defendant, in his answer, admitted the plaintiff's title to \$125 of the sum on deposit, and claimed the balance as his own. The plaintiff served a reply to the answer, in which she reiterated her claim to the entire fund. The issue was tried, and the jury found that \$425 of the fund belonged to the plaintiff, and the balance, \$322.98, belonged to the defendant. Each party denies the right of the other to costs, and the court is called upon to determine whether either and which of the parties is entitled to costs under the peculiar circumstances stated.

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Howe & Hummell, for motion.

John O. Mott, for defendant.

MCADAM, Ch. J.—The action of interpleader is of equitable origin, and the remedy provided by the Code is merely concurrent (9 *How. Pr.* 193;* 1 *E. D. Smith*, 665;† S. C., 8 *How. Pr.* 45; 14 *Id.* 505‡). The principles which govern the remedy, either in equity or under the Code, are alike, and the rule formerly prevailing as to costs should, as far as practicable, be applied to the present practice. It is evident that the general provisions of sections 3228, 3229, of the Code, as to costs, were not intended to include interpleader actions, where, as here, each party prevails in establishing title to a substantial part of the fund in dispute. The case, in consequence, falls within section 3230, which leaves the award of costs discretionary with the court. This construction agrees with that approved by Willard in his work on equity jurisprudence (*Potter's Ed.* 321), where he says that the Code, section 306 of old, and section 3230 of new, vests the court with the same discretion in such actions as existed before; and under the former practice costs were not matter of right in interpleader cases. They rested in the discretion of the court (*Bedell v. Hoffman*, 2 *Paige*, 199). This also accords with the present general legislative intent (2 *R. S.* 617, § 20; 3 *Wail's Pr.* 468, 469; *Code*, § 3234). The legislature, certainly, did not intend, even under the interpleader allowed by the Code, that a defendant whose defense was meritorious and who succeeded in it to the extent of prevailing in the action equally with the plaintiff, should be arbitrarily mulcted with costs, as of course, for presenting a claim fully as just as that

* *Beck v. Stephani*.† *Chamberlain v. O'Connor*.‡ *Patterson v. Perry*.

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made by his adversary. Such an interpretation would be harsh and oppressive and tend to establish an immutable rule which might in some case work great injustice. The intention was to avoid this possible result by leaving the question of costs in such actions to the discretion of the court; that they might be allowed or withheld according to equitable principles, and in furtherance of justice. This intent, if it required further evidence to make it manifest, will be found in the statute (3 *R. S.* [6 ed.] 378, § 392), which provides that where the title to a fund on deposit with a savings bank is disputed an interpleader may be allowed, to the end that the rival claimants interested in the dispute may be brought into the litigation, and the bank allowed to drop out, and which further provides "that the question of costs in the actions referred to shall in all cases be in the discretion of the court, and may be charged upon the fund affected by such action." It is clear, therefore, that the award of costs rests entirely in the discretion of the court, and the only question left is to exercise the discretion for the best interest of all concerned, keeping in mind the smallness of the fund. The plaintiff and defendant are husband and wife; they disagree, and in consequence separate. Law-suits followed, and this is one of them.

As usual in such intestine quarrels, each of the parties is right to an extent and beyond that wrong. The interest of all will be best subserved by holding that each of the litigants have the portion of the fund to which they are respectively entitled; that neither have costs against the other; that the costs of the respective attorneys be not charged on the funds, and that the attorneys on each side be left to regulate his fees with his client when the fund is paid over.

The disbursements incurred by each of the litigants in determining the title to the fund, should, as a necessary incident, be taxed and charged upon the fund, but

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the application for further costs or allowance will be denied. A decree in accordance herewith may be submitted.

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SAME v. SAME.

SUPREME COURT, FIFTH DEPARTMENT, ERIE COUNTY,
SPECIAL TERM, APRIL, 1886.

§§ 484, 817.

Consolidation of actions—Action to foreclose mortgage.

Only such causes of action can be consolidated as may be joined. Actions for the foreclosure of mortgages are not actions on contract within the meaning of section 484, subdivision 1, of the Code of Civil Procedure,—which provides for the joinder in the same complaint of actions on contract,—but are actions *in rem* against parcels of land, and they cannot be consolidated where they do not arise out of the same transaction or transactions.

Where, in two actions brought to foreclose two mortgages on separate adjoining parcels of land, both of which were executed on the same day, by the defendants to the plaintiff, the parties were the same and the defenses identical, —*Held*, that the actions could not be consolidated.

The rule as to the consolidation of such actions prior to the Code of Civil Procedure, stated.

(*Decided April, 1886.*)

Motion by defendants that the actions be consolidated.

The opinion contains a sufficient statement of the facts.

Manly C. Green, for defendants and motion.

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Cited : Eleventh Ward Savings Bank v. Hay, 8 *Daly*, 328 ; S. C., 55 *How. Pr.* 442 ; aff'd, 73 *N. Y.* 609 ; Mayor v. Coffin, 90 *N. Y.* 313

E. J. Plumley (*Plumley & Kingston*, attorneys), for plaintiff, opposed.

Section 817 of the Code of Civil Procedure is substantially identical with provisions of the Revised Statutes : 2 *R. S.* p. 383, § 36 ; 2 *Wait's Practice*, 555 ; *Thomas on Mortg.* 268-9. "The Code of Procedure did not change the practice in regard to the consolidation of actions (*Morris v. Knox*, 6 *Abb. Pr.* 328, *note*), nor has it been changed by the Code of Civil Procedure, *Bech v. Ruggles*, 6 *Abb. N. C.* 69 ; *Lockwood v. Fox*, 8 *Daly*, 127 ; *Campbell P. P. M'f'g Co. v. Lyddy*, 1 *N. Y. Civ. Pro.* 364." In every reported case in which the question has been considered, it has been held that actions to foreclose mortgages should not be consolidated. *Grant v. Spencer*, cited in *Thomas on Mortg.* 269 ; *Bech v. Ruggles*, *supra* ; *Lockwood v. Fox*, *supra* ; *Kipp v. Delamater*, 58 *How. Pr.* 183. An order directing that the action should be consolidated would be "a judicial determination that separate suits were originally instituted, without legal necessity, for an improper purpose." *Lewis v. Dodge*, 17 *How. Pr.* 228-9. This the court should not judicially determine in this case, and the same reasons exist for continuing the actions separately as for commencing separate actions. Foreclosure actions are actions *in rem* (*Kipp v. Delamater*, *supra*), and the proceedings under each mortgage, the mortgages not covering the same property, should be kept separate for obvious reasons. It is better for the defendants to have the actions kept separate, so that they may redeem from one of the mortgages, if they desire and are able to do so, without being compelled to redeem from the other also. 2 *Jones on Mortg.*

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§ 1083. . . . The effect of consolidating the two actions would be to discontinue one of them, and no costs to the time of consolidation could be taxed as to the discontinued action, without express provision to that effect in the order decreeing consolidation. *Lewis v. Dodge, supra.* The plaintiff should not be deprived of the costs which are already earned.

LEWIS, J.—These actions are brought to foreclose mortgages, given by defendants, on separate adjoining parcels of land, in Buffalo. Both mortgages were executed upon the same day, to the plaintiff, as mortgagee. Parties are the same in both actions and the defenses are identical.

The defendants ask an order consolidating the actions.

The court of chancery uniformly refused to consolidate actions of this character where the mortgages were upon separate parcels of land, but if upon the same lands, and the parties were the same, the bringing of separate actions was not tolerated. Section 36, 2 *Revised Statutes*, 383, provided that “whenever several suits shall be pending in the same court by the same plaintiff against the same defendant, for causes of action which may be joined, the court, in which the same shall be prosecuted, may, in its discretion, if it appear expedient, order the several suits to be consolidated into one action.” But this section had no application to equity actions. Title 6, of which this section is a part, applied only to proceedings in the progress of law actions. These provisions were, in substance, incorporated for the first time into the Code in the year 1877, so that when the decisions were made, referred to in the briefs submitted, they were not a part of the Code. Section 817 of the Code provides, that only such actions may be consolidated as may be joined. Section 484 mentions what causes

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of action may be joined. If actions to foreclose mortgages upon separate parcels of land can be joined, it must be by virtue of subdivisions 1 or 9 of section 484. Subdivision 1 provides that actions which are brought to recover upon contract, express or implied, may be joined. While in some sense a mortgage may be a contract, the main and principal object of a foreclosure action is to cut off the mortgagor's equity of redemption in the mortgaged premises. Incidentally, in case a bond accompanies the mortgage, as in this case, a judgment for deficiency is sought. Can it be said that actions to foreclose mortgages are brought to recover upon contract? It is an action *in rem* against a parcel of land. Such actions do not come under subdivision 9. The mortgages are not claims arising out of the same transaction or transactions, neither are they connected with the same subject of action. The transactions and the subject-matter are distinct and separate, having no relation with each other.

My conclusion is, that the Code does not provide for joining such actions. This conclusion seems to be in accordance with the current of authorities.

The motion, therefore, to consolidate is denied, but without costs.

PURDY, ET AL., v. WEBSTER, ET AL.

N. Y. SUPERIOR COURT, SPECIAL TERM, FEBRUARY,
1886.

§§ 893-895.

Open commission—When not granted.

An open commission to examine witnesses in Florida will not be granted where it appears that the witness in question resides in Cuba, the papers not showing that such witnesses are present in

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the State of Florida, and no reason, except the expense, being given to show why it would be more difficult to examine the witnesses in New York city.

(Decided February 17, 1886.)

Application for open commission.

The opinion states the facts.

James B. McKewan, for the motion.

J. Hampden Dougherty, opposed.

INGRAHAM, J.—By section 895 of the Code an open commission cannot be allowed where the testimony is to be taken elsewhere than in the United States or in Canada.

The witnesses that the defendants propose to examine do not reside in Florida, nor does it appear that they are at present in that State; but it does appear that they reside in the Island of Cuba.

This application, therefore, for an open commission appears to be intended to evade the prohibition contained in section 895, and I do not think that such an order should be granted, unless it is made to appear that such a commission was absolutely necessary for the protection of the applicant's rights.

No reason is given here to show that it would be any more difficult for defendants to procure the attendance of the witnesses sought to be examined at New York than in Florida, except the difference in the expense, and as the evidence is for the benefit of the defendant, it is not fair that the plaintiffs should be put to the expense of employing counsel in Florida or sending a representative there to attend such an examination.

Under all the circumstances, I think that the application for an open commission should be denied.

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Defendants, however, may take an order for a commission in the usual form to examine the witnesses named, either in Florida or in Cuba, if they desire. Order can be settled on notice.

BUERMANN, AS GENERAL GUARDIAN, ETC., ET AL.,
v. BUERMANN, INDIVIDUALLY AND AS EXECUTRIX, ETC., INTERPLEADED, &C.

SUPERIOR COURT OF THE CITY OF NEW YORK, SPECIAL
TERM, MARCH, 1886.

§§ 469, 470, 476.

Infant—Action concerning personal estate of, by whom brought.

An action relating to the personal estate of an infant can only be brought in the name of the infant by his guardian *ad litem*, appointed for that purpose, and cannot be brought by his general guardian as such.

Cagger v. Lansing (64 N. Y. 418), distinguished.
(Decided March 27, 1886.)

Demurrer to complaint.

This action was brought by the heirs and executors of August Buermann, deceased, and general guardians of infants, against the Produce Exchange, and the widow and executrix. The deceased was a member of the Exchange, the laws of which provided that upon the death of a member, his widow and children should each have one-half of a gratuity fund erected for such purpose. The heirs and executors claimed that the widow had in the lifetime of her husband executed and delivered a release under seal of her share to her husband and his children; that the Pro-

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duce Exchange, however, would not pay the fund to the executors without a release from the widow to it, wherefore the complaint demanded judgment that the widow be compelled to execute such release, and that they have judgment against the Produce Exchange for \$5,000, and that this amount be paid to the two executors.

The widow and executrix separately demurred to the complaint, upon the grounds, among others that the general guardians had no power to sue in their own names.

George F. Langbein, counsel for defendant, demurring.

Otto Meyer, for the plaintiff, opposing.

O'GORMAN, J.—This action is brought by the general guardians of infants to assert their claims against the New York Produce Exchange, for \$5,000, which became due and payable by that association, to the widow and next of kin of August Buermann, deceased, and against Eva Buermann, the widow, who demurs on the ground, among others, that the general guardians had no right or power to sue in their own names to recover this property, belonging to the infants, and that suit could only be properly brought by a guardian *ad litem*.

The question raised by this demurrer has not been altogether free from doubt.

In *Segelken v. Meyer* (5 *N. Y. Civ. Pro.* 1), the court says that it does not appear to have ever been decided by that court. It held, however, that that action was well brought in the name of the guardian *ad litem*.

The Code of Civil Procedure, which in sections 469, 470 and 476, requires that before a summons is issued

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in the name of an infant plaintiff, a competent person must be appointed to act as its guardian *ad litem*, and provides also that the general guardian may be appointed as *ad litem*, sufficiently expresses the intent of the law as it now is, viz. : that by the intervention of that officer alone an action on behalf of an infant can be brought, at least, in cases where the assertion of the infant's claim to recover personal property is concerned.

The case of *Cagger v. Lansing* (64 N. Y. 418) was decided before the adoption of the Code of Civil Procedure now in force. It was an action brought by the general guardian of infants to recover real estate, and it was held that their rights in such an action were enforceable by their mother as guardian *in socage* (*Id.* p. 426).

The case at bar is concerned with the assertion of the claim of the infants, not to real estate, as to which alone a guardian *in socage* could have represented them in an action, but only to personalty, and the case last cited throws therefore no light on the present inquiry.

In my opinion, the necessity of clear and uniform practice under the provisions of the Code of Civil Procedure above referred to, requires that the rule should be recognized, that in cases such as that at bar the action should always be brought in the name of the guardian *ad litem*, properly appointed, and that if brought in the name of the general guardian they are not well brought.

For these reasons this demurrer is sustained, with costs.

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THE PEOPLE, *ex rel.* KROHN, APPELLANTS, v.
MILLER, AS TREASURER OF THE NEW YORK
COTTON EXCHANGE.

SUPREME COURT, FIRST DEPARTMENT; GENERAL
TERM, MARCH, 1886.

§§ 2067, *et seq.*, 2068, 2083.

Mandamus—Reference on application for—Effect of referee's determination—When writ refused.

Where the issues framed by an answer to an alternative writ of mandamus were referred by consent, and an order entered appointing a referee "to hear and determine all the issues" in the proceeding, —*Held*, that the referee was empowered to hear and determine the entire controversy between the parties, including the relator's right to a peremptory writ of mandamus, and that the referee was not deprived of that power by the provisions of the Code of Civil Procedure, directing that "the writ of mandamus should be issued either by a special or by a general term of the supreme court."^[1]

Where in such a case a hearing was had upon the referee's report before the special term which denied the application for a peremptory writ of mandamus, —*Held*, that this was a final disposition of the case by the court itself, and if the judgment entered upon the decision made by the court was correct upon the facts found by the referee, it should be sustained upon appeal.^[2]

Where the case on an appeal from a judgment entered on a referee's report contains the evidence only as to the value of the property in question, the rights of the parties should be determined upon the facts found by the referee to have been proven on the trial.^[3]

Where the by-laws of an incorporated exchange provided that a certificate of membership might be transferred to a member or a member elect, by a surrender of the certificate, with a duly executed assignment thereof, and the payment of a fee of \$25 to the treasurer, who should issue a new certificate of membership to the assignee, but that no certificate should be so "transferred until a notice of the intention to make such transfer subscribed by the member owning the certificate shall have been posted upon the bulletin of the exchange for ten days, and until all claims against such

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member, which may be presented within said ten days by other members, shall be settled, or while any annual dues or assessments levied on such membership shall remain unpaid," and the by-laws also authorized the sale of a member's share in case of his failure to meet his obligations to other members of the exchange, and the application of the proceeds to the payment of his debts,—*Held*, that the posting by a member of such a notice of an intention to transfer his certificate of membership should be followed at the expiration of the ten days by a transfer, and that where it was not, his membership, and the rights of other members to whom he became indebted after the expiration of the ten days to have his share sold to satisfy his indebtedness to them, was not affected by the notice.[⁴]

One who is a member of an exchange, and owns a certificate of membership therein, and enjoys all the privileges of membership, cannot enforce by mandamus a right that he has to have an additional certificate of membership transferred to him, and a new one issued in its place where such certificate will in no manner increase his rights beyond the ability to sell it as an article of property; his remedy is not by mandamus, but by a suit for the value of the certificate.[⁵]

A writ of mandamus will not be granted where the law supplies another adequate remedy.[⁶]

Although in cases against public officers, and in certain cases against corporations, the writ of mandamus has not been refused where an action for damages might also be maintained,[⁷] no such departure from the general rule has been made or sanctioned where the writ of mandamus has been applied for to obtain a mere article of property of a fixed and definite value, the recovery of which would afford full justice to the applicant.[⁸]

(*Decided March 4, 1886.*)

Appeal from judgment denying application for peremptory mandamus.

The opinion states the facts.

Frank F. Van Derveer, for relator, appellant.

Francis M. Scott, for respondent.

DANIELS, J.—The writ of mandamus was applied for to require the respondent as treasurer of the New

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York Cotton Exchange to transfer a certificate of membership standing in the name of Constant Von Meien, and to issue a new certificate to the relator. The New York Cotton Exchange is a corporation formed under chapter 365 of the Laws of 1871, and its organization consists of the officers mentioned in the act, and other persons to whom certificates of membership may be issued. These certificates of membership permit the persons to whom they may be issued to transact business as members of the exchange. And by the power given to the corporation by section 3 of its charter to adjust controversies between its members, to establish just and equitable principles in the trade, and to maintain uniformity in its rules, regulations and usages, the corporation through its officers had the power to supervise and regulate the business carried on by its members. It was also empowered by the same section to make all proper and needful by-laws, not contrary to the constitution and laws of the State of New York or of the United States, and by section 4 of the act to admit new members and expel any member, in such manner as might be provided by its by-laws.

The relator and Von Meien each held a certificate of membership in the corporation. And the relator purchased, as he was at liberty to do under the by-laws, the certificate held by Von Meien, and took a power of attorney authorizing its formal transfer. He also executed a written transfer and assignment of the certificate to himself, which was affirmed and ratified in writing by Von Meien, and upon this instrument and the payment of a fee of \$25 required by one of the by-laws before a transfer could be made, he applied to the treasurer to receive a surrender of the certificate he had purchased, and to issue a new certificate of membership to himself in lieu thereof. This was refused by the treasurer, and it was to enforce

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compliance with the request that the application was made for a writ of mandamus.

Upon the application the court ordered an alternative writ to issue, to which a return was made denying the relator's right to a certificate of membership on the surrender of that purchased by him, and alleging other matters which were relied upon by way of answer to his alleged right to surrender the certificate purchased by him and to receive another in its place. The issues framed by the answer and the alternative writ were, by the consent of parties, referred to a referee, as that was authorized to be done by section 2083 of the Code of Civil Procedure.

The order which the parties entered directed, "That this proceeding be and the same hereby is referred to Benjamin H. Bristow, Esq., counselor at law of this court, as referee to hear and determine all the issues in this proceeding."

And acting under the order, the referee heard and determined the entire controversy between these parties.

[¹] It has been objected, in support of the appeal, that he was not authorized to dispose of the rights of the parties in the proceeding; but that view cannot be entertained under the very general language of the order, for the referee was empowered by it to hear and determine all the issues in the proceeding, and that included the right of the relator to a peremptory writ of mandamus. The trial of the issues of necessity included the determination and disposition of the rights controverted by means of them. And the referee was not deprived of that power under this order by the provisions of the Code, directing that the writ of mandamus should be issued either by a special or general term of the supreme court.

[²] And if a different view of the power of the referee could be adopted, it would not promote

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the success of the relator, for as a matter of fact the case was brought to a hearing upon the referee's report, before the special term, and that court denied his application for the writ. This was a final disposition of the case by the court itself, and if the judgment entered upon the decision made by the court is correct upon the facts found by the referee, then the appeal cannot be sustained.

['] The case contains the evidence only as to the value of the share. And the rights of the parties are accordingly to be determined upon the facts which the referee has found to have been proved upon the trial. By his report it is shown that by-laws were adopted by the corporation for the management of its affairs, and the enforcement of the obligations of its members to each other arising out of the transaction of their business as members of the exchange. And by section 5 of the by-laws it was provided that a certificate of membership might be transferred to a member or a member elect, but to no other person, by a surrender thereof to the treasurer of the exchange with a duly executed assignment, and the payment of a fee of \$25 for transferring the certificate. And upon which transfer the treasurer, it was directed, should issue a new certificate of membership to the member or member-elect mentioned in the assignment. But this was restricted by the same section which contained the declaration that no certificate of membership shall be "so transferred until a notice of the intention to make such transfer, subscribed by the member owning the certificate, shall have been posted upon the bulletin of the exchange for ten days, and until all claims against such member, which may be presented within said ten days by other members of the exchange, shall be settled, or while any annual dues or assessments levied on such membership shall remain unpaid."

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And the treasurer refused to accept the surrender and issue a new certificate for the reason, as it was considered, that the relator had not complied with what had been required on the part of his assignor in this manner. The authority was given to the relator by his assignee to obtain a transfer of the certificate of membership on December 10, 1883, and a notice in writing subscribed by Von Meien of his intention to make a transfer of the certificate, was posted upon the bulletin of the New York Cotton Exchange at that date, and it remained posted in that manner until the month of November, 1884. But no application for the surrender of the certificate and the issuing of another to the relator was made to the treasurer of the corporation, until September 19, 1884.

During this interval of time, the assignor continued to transact business as a member of the exchange, and in that business became indebted to other members, and failed, as the by-laws require that to be done, to pay or extinguish the indebtedness. By one of the rules of the exchange, no member was bound to accept the contract of another while a notice was posted upon the bulletin, of his intention to make a transfer of his share. But the members were still at liberty to deal with him if they elected so to do, for the rule proceeded no further than to relieve them of the obligation to accept the contracts of the member proposing to sell his share. They were still at liberty, notwithstanding this rule, to accept his contract and deal with him as long as he continued to be a member of the exchange. The members still dealt with him, and in that manner this indebtedness on his part to them was created. By other sections of the by-laws, where a member in the course of his dealings became indebted to another, and the debt was not settled or liquidated at maturity, the creditor was empowered to record the fact of the failure of the debtor to meet his liabilities

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in a book kept by the superintendent of the exchange entitled "Record of Failures." The by-laws then provided for further proceedings, on complying with which the share of the delinquent member might be sold, and its proceeds applied, so far as that should be necessary, to the payment of his indebtedness to other members of the exchange.

For the satisfaction of the debts incurred by Von Meien to other members of the corporation previous to September 19, 1884, the steps required by the by-laws were taken in favor of the creditors-members, and a resolution was finally adopted, directing the sale of this share to the highest bidder, with the object of satisfying these demands out of its proceeds. The right of the corporation to proceed in this manner was denied on behalf of the relator, for the reason that a notice of the intention to transfer this share had been posted upon the bulletin of the exchange for more than ten days prior to the contraction of either of these debts. But a doubt arises as to the sufficiency of the notice itself to produce this effect, for the by-law has in effect directed that the notice to be posted shall be of the intention to make a transfer of the certificate by the action, and under the authority of the treasurer of the exchange, while it does not appear, as the fact has been found in the case, that such a notice was posted upon the bulletin.

What the referee has found as to this fact is that Von Meien, on December 10, 1883, caused to be posted upon the bulletin "a notice in writing subscribed by himself, of his intention to make a transfer of said certificate," which fell short of the statement to be made in the notice prescribed by the by-law, for that was required to express the intention to make the transfer by a surrender of the certificate held at the time to the treasurer, and to receive a new certificate of membership in its place from him. The notice

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which was posted, as the referee has described it, would be entirely satisfactory with a transfer made from Von Meien to the relator, which would be insufficient to produce a termination of the membership of his assignor. Then the by-law provided that the notice should be one of ten days, and the notice it designated was that the transfer of the certificate permitted by the preceding portion of the section, should be made by the action of the treasurer of the exchange. While the by-law has not in language so expressed, it is not an unreasonable inference from it that the notice was intended to indicate when the surrender should be made, and the new certificate applied for. It did not certainly by its language authorize an indefinite notice to be given that might extend through a period of years, as well as months. But the notice was restricted to the period of ten days, and if at its expiration no surrender of the certificate should be offered, and no application for a new certificate made, it would not be an unreasonable construction of the by-law to hold that the proceeding had been for the time abandoned. To allow the notice to remain indefinitely effectual, would operate unjustly upon the other members of the exchange; for, while it would permit the person named in the certificate proposed to be sold, to continue to act as a member, and to induce other members to accept his contracts, it would empower him to defeat the remedy provided for by the by-laws for the collection and payment of their obligations.

The other sections of the by-laws contained in the report of the referee are not consistent with the freedom from liability asserted on behalf of the certificate in controversy. For they have provided generally for the enforcement of the payment of the indebtedness of one member to another out of the proceeds resulting from the sale of the delinquent member's certifi-

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cate. And until the certificate itself may be surrendered and a new certificate of membership issued upon its surrender, both the corporation and its members would seem to have the right to regard the person proposing to sell or transfer his certificate as still a member until the transfer should be made complete, by the issuing of a new certificate. As between the parties themselves to the transfer, the title would pass to the certificate without complying with the by-law providing for its surrender and the issuing of another certificate in its place. But as to the corporation and the other members of the exchange, the rule should be different, as it clearly is, so far as by-laws apply to shares of stock owned in a private corporation. There a transfer between the parties themselves will convey the title, but where no notice of it may be given to the corporation, and no transfer of the shares shall be made upon its books, it can only consider as the owner the person appearing to be such upon its records (*McNeill v. Tenth Nat. Bank*, 46 *N. Y.* 325, 332; *Cushman v. Thayer Man'f. Jewelry Co.*, 76 *Id.* 365; *Brisbane v. Delaware, L. & W. R. R. Co.*, 94 *Id.* 205).

And that rule, from the reason upon which it is founded, seems to be equally as applicable to this case. It might very well be assumed, even if the notice which was posted complied in its form with the by-law, that the intention to transfer the certificate was abandoned, if that was not done at the expiration of the ten days mentioned in the notice, and upon that presumption the person giving the notice would still be entitled to conduct himself in his dealings as a member of the exchange. If it had not been the purpose that the transfer should follow the expiration of the ten days, then no object existed for prescribing that period of time at all. If an indefinite notice, not less than ten days, was what was intended to be permitted, it is only reasonable to presume that the by-

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law would have so declared. And that it did not do so, but provided for the posting of a notice for ten days, and no more, and no less than that, it may be inferred that it was intended that a definite notice for this period, and no other, should be given by the person proposing to transfer the certificate. The propriety of this construction is disclosed by the careful provisions contained in the succeeding by-law, providing for the enforcement between themselves ['] of the obligations of the members of the exchange.

And as to the corporation, those persons continued to be members, who appeared by its certificates to be such, and that was the relation which Von Meien maintained to the exchange until the application for the surrender of the certificate was first made, on September 19, 1884.

It has been urged that the power did not exist to enforce the payment of debts against this certificate, created after the expiration of ten days from the time when the notice was posted. The by-law does designate preceding debts as the only claim which the member must pay before he can be permitted to transfer his certificate. But this objection also fails entirely of its effect if the notice itself is to be held to expire with the ten days. And if it does not, then a member of the exchange not indebted, could post his notice upon the bulletin of his intention to transfer his certificate, and omit to do it at the expiration of the ten days, and then continue to act upon it for years afterwards, and deprive the other members of the exchange having demands against him, arising out of their dealings, from all right of satisfaction by the appropriation and sale of his certificate. That could not have been the intention of the by-law, and it is not necessary so to construe it. It should not be applied in such a manner as to permit this misconduct

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as well as injustice, if that can be, as it may under the by-laws be avoided.

But without disposing of the case upon these considerations, a further legal difficulty stands in the way of the success of the proceedings. The relator has, at all times referred to in this controversy, been the owner in his own right of another certificate of membership in the exchange. Under that, all the rights and privileges pertaining to membership are possessed and enjoyed by him. An additional certificate would not increase these privileges beyond the unimportant circumstances that he might post a notice of his intention to transfer the one he now has, and still insist upon the obligation of the members of the exchange to accept his contracts. But as no intention has been asserted in his behalf at any time, to transfer the certificate he now has, a mere possibility or contingency of this description can legally have no direct influence in the disposition of this controversy. As the case upon the facts has been presented, he is a member in good standing, possessing all the immunities pertaining to that relation, with the other members, as well as the corporation itself. What he has to gain in this proceeding, and all that he has, is another certificate in no manner increasing his rights beyond the ability to sell it as an article of property. And even though he may be unlawfully deprived of that right, his remedy for its correction is not by way of the writ of mandamus.

Upon this subject it has been stated as the law that, "The existence of another adequate remedy by an ordinary action at law is a sufficient bar to the ['] exercise of the jurisdiction by mandamus over corporate associations or organized bodies, as well as in all other cases, it being a fundamental principle lying at the very foundation of the law of mandamus, that the right is never granted where the law

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supplies another adequate and specific remedy" (*High on Extraordinary Remedies*, &c., § 283).

And the same legal principle has been stated in nearly the same language, in section 710 of *Angell and Ames on Corporations*.

It was also considered and so defined in *Matter of Shipley* (10 *Johns.* 484).

The certificate, according to the evidence, was of the value of \$3,000 at the time when it was offered to be surrendered to the treasurer, and he was requested to issue another in its place. A recovery of that [°] amount would fully indemnify the relator for whatever loss he may have sustained, if he was entitled to the new certificate. And that value could legally be recovered by him if he is right in the position that the certificate which he applied for should have been issued to him (*Sargent v. Franklin Ins. Co.*, 8 *Pick.* 90; *Gray v. Portland B'k*, 3 *Mass.* 364; *Bond v. Mt. Hope Ins. Co.*, 98 *Mass.* 505; *Murray v. Stevens*, 110 *Mass.* 95; *Germania Union Co. v. Sendmeyer*, 50 *Penn.* 67; *Bank v. Lanier*, 11 *Wall.* 369; *Bank or Attica v. Mfrs., &c. Bank*, 20 *N. Y.* 501; *Cartwright v. Commercial Bank*, 22 *Wend.* 348).

In cases against public officers, and in certain cases against corporations, the writ of mandamus has not been refused where an action for damages might ['] also be maintained (*McCullough v. Mayor, &c.*, 23 *Wend.* 457; *Buck v. City of Lockport*, 7 *Lans.* 551).

[°] But no such departure from the general rule has been made or sanctioned where the writ of mandamus has been applied for to obtain a mere article of property of a fixed and definite value, the recovery of which would afford full justice to the applicant. That is this case, and both the referee and the special term adopted that view of it in the decision and judgment which have been made and rendered. On this ground,

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therefore, even if that previously considered should not be held to be controlling, the relator was not entitled to this writ, and the judgment should be affirmed, with costs.

LANIER ET AL. v. THE CITY BANK OF
HOUSTON.

SUPREME COURT, FIRST DEPARTMENT, NEW YORK
COUNTY; SPECIAL TERM, APRIL, 1886.

§§ 440 *et seq.*, 636.

Service by publication.—What sufficient publication of summons in action against a foreign corporation—Sufficiency of affidavits on which attachment granted.

It is doubtful whether chapter 263 of the Laws of 1885, entitled "An act to provide for the designation of a newspaper in the city of Albany, for the publication of certain public notices,"—which provides that "all notices and advertisements required by law to be published in a newspaper in actions against foreign corporations, shall be published in said paper,"—applies to a summons in an action against a foreign corporation, served by publication, but as the act does not provide that failure to comply with its terms shall render the proceeding against the foreign corporation void, even if publication of a summons comes within the language of the act, an omission to publish the summons in the paper designated under the act, does not deprive the court of jurisdiction where the provisions of the Code of Civil Procedure in reference to the publication of a summons have been in all respects complied with.

It is not necessary that the verification of a complaint, in which all the allegations are upon information and belief, which is used on an application for an attachment, should state the grounds of the information and belief, where there is also an affidavit stating positively the facts alleged in the complaint.

While it is necessary that the affidavit on which an attachment is issued, should state facts showing that a cause of action exists, and

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enabling the court to determine that the case is one in which the issuing of an attachment would be proper, it is not necessary for the plaintiff to lay before the court in his affidavit, all the evidence which he will be required to offer at the trial, and the statement of facts in the affidavit need not be more specific than the statement of the same facts in a complaint.

Where the affidavit on which attachment was issued, alleged that the draft on which the action was brought, was presented for payment and payment thereof demanded and refused, and said draft was thereupon duly protested,—*Held*, that it sufficiently showed a demand, neglect or refusal to pay, and notice thereof to the drawer.

(*Decided April, 1886.*)

Motion by Eugene H. Pullen, a junior attaching creditor of the defendant, to vacate the attachment issued in this action and levied on the defendant's property.

This action was brought to recover on a draft drawn by the defendant to the order of the plaintiffs. The complaint and the affidavit on which the attachment was granted alleged that it was duly presented for payment, and payment refused, and that it was thereupon duly protested.

Other facts are stated in the opinion.

Rodman & Adams, for junior attaching creditor and motion.

Bristow, Peet & Opdyke, for plaintiffs, opposed.

LAWRENCE, J.—Chapter 262 of the laws of 1885, entitled “An act to provide for the designation of a newspaper in the city of Albany for the publication of certain public notices,” provides among other things that “all notices and advertisements required by law to be published in a newspaper in actions against foreign corporations” shall be published in said paper.

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It is further provided by said act that "such notices and advertisements are not to be substituted for those now required to be published in other newspapers, but additional thereto." As this is an action against a foreign corporation it is claimed that the attachments heretofore issued herein should be vacated because the summons, although properly published in two newspapers, as required by section 440 of the Code of Civil Procedure, was not published in the newspaper designated under the act of 1885. Although the language of that act is very comprehensive, it may well be doubted, I think, whether the publication of a summons is fairly embraced within the terms "notices and advertisements." There are many notices and advertisements required to be made under existing statutes in reference to corporations, and as there is nothing upon the face of the act of 1885 which shows that it was the intention of the legislature to change the course of procedure prescribed by the Code in reference to the publication of a summons, such a construction should not be given to that act, unless the court can clearly see that is susceptible of no other interpretation.

In the view which I take of this case, it is not necessary, however, to definitely decide whether the publication of a summons comes within the language of the act of 1885, for the reason that that act nowhere provides that a failure to comply with its terms shall render the proceeding against the foreign corporation void. I am therefore prepared to hold that the omission to publish the summons in the paper designated under the act of 1885, does not deprive the court of its jurisdiction; it appearing that the provisions of the Code of Civil Procedure, in reference to the publication of a summons, have been in all respects complied with.

With respect to the objection that the complaint,

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which was one the papers on which the attachment was obtained, alleges all the material matters upon information and belief, I deem it sufficient to say that the same matters are stated by Mr. Winslow,* positively in his affidavits, and that therefore there was no necessity that he should disclose the sources from which his information was obtained.

I also think that the affidavit is sufficiently specific as to the notice of presentment, demand, refusal, non-payment and protest of the draft. While it is necessary that the affidavit upon which an attachment is obtained, should state facts showing that a cause of action exists, and enabling the court to determine that the case is one in the issues of an attachment would be proper, it does not seem to me that it is necessary for the plaintiff to lay before court in his affidavit, all the evidence which he will be required to offer at the trial.

In other words, I do not see why the statement of a fact in an affidavit to procure an attachment need be more specific than the statement of the same fact in a complaint. Section 481 of the Code of Civil Procedure, which is a substitute for section 142 of the old Code, requires that the complaint must contain a plain and concise statement of the facts constituting each cause of action without necessary repetition.

In *Woodbury v. Sackrider* (2 *Abb. Pr.* 402), it was held that in an action on a bill of exchange against the acceptor, an averment in the complaint that payment of the bill was duly demanded at maturity, and the same was thereupon duly protested for non-payment, was sufficient to admit evidence of demand, neglect, or refusal to pay, and notice then thereof to the acceptor. See also *Allen v. Patterson*, 7 *N. Y.* 476, and particularly pp. 478 and 480; *Badeau v.*

* One of the plaintiffs.

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Niles, 9 *Abb. N. C.* 48; French v. Willett, 10 *Abb. Pr.* 99; Brown v. Champlin, 66 *N. Y.* 219, per CHURCH, Ch. J.

For these reasons, I am of the opinion that the papers upon which the attachment was issued, stated facts sufficient to give to the justice who issued the attachment, jurisdiction, and that the conclusion at which he arrived as to the propriety of issuing the attachment should not be disturbed.

The learned counsel for the plaintiff also resisted this motion upon the ground that the papers upon which the junior attaching creditor, who now moves, obtained his attachment are defective, citing *Tim v. Smith*, 3 *N. Y. Civ. Pro.* 416. As I have already reached the conclusion that the plaintiff's papers are sufficient, it will be unnecessary to consider the alleged defects in the moving parties' papers.

In addition to the case above cited, see *Smith v. Mahon*, 2 *N. Y. Civ. Pro.* 60, remarks of DAVIS, P. J.
Motion denied, with costs.

MATTHEWS AND ANOTHER v. SMITH ET AL.

SUPREME COURT, FOURTH DEPARTMENT, OSWEGO
COUNTY, SPECIAL TERM, APRIL, 1886.

§§ 525, 526.

Verification—Form of, to complaint when made by attorney in action on written instrument for the payment of money only.*

Where, in an action brought to recover the amount of two promissory notes, the complaint alleged positively the partnership of the plaintiffs, but stated all other matters on information and belief,

* See Note on the Verification of Pleadings in Actions under the Code of Civil Procedure, 8 *N. Y. Civ. Pro.* 438.

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and was verified by one of the attorneys for the plaintiffs, who stated in the verification that the "action is founded on written instruments for the payment of money only, which are in the possession of this deponent, which is the reason this verification is not made by this deponent instead of the plaintiffs," but did not set out the grounds of his information and belief,—*Held*, that the verification was sufficient.

It is not necessary that the verification of a complaint made by the plaintiff's attorney in an action on a written instrument for the payment of money only, should state the grounds of his belief as to those matters not stated upon his knowledge.

Hyde v. Salg (27 *Hun*, 369); *Smith v. Rosenthal* (11 *How. Pr.* 442), followed.

(Decided April 20, 1886.)

Motion by defendants to set aside judgment for the plaintiffs, entered by default.

J. R. O'Gorman, attorney for defendants and motion.

G. N. Burt (*Burt & White*, attorneys), for plaintiffs, opposed.

CHURCHILL, J.—This action is brought to recover the amount of two promissory notes claimed to have been made by defendants. The complaint avers positively the partnership of the plaintiffs, but all other matters are stated on information and belief. The complaint is verified as follows :

"George N. Burt, being duly sworn, deposes and says that he is one of the attorneys for the plaintiffs in this action ; that he has read the foregoing complaint, and knows the contents thereof ; and that the same is true to the knowledge of deponent except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true ; that the foregoing action is founded on

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written instruments for the payment of money only which are in the possession of this deponent, which is the reason this verification is made by this deponent instead of the plaintiffs. G. N. BURT."

"Sworn to before me, March 13, 1886.

"B. B. BURT, Notary Public."

The defendants considered this verification not a compliance with section 526 of the Code, and served an unverified answer, which the plaintiffs returned, and entered judgment for the amount demanded in the complaint, to set aside which this motion is made.

Had the last clause, "which is the reason, etc.," of the above affidavit being omitted, and instead thereof the words, "which said instruments are the grounds of deponent's knowledge and belief," been inserted, the affidavit would have been precisely in the form approved by the general term of this department in *Hyde v. Salg* (27 *Hun*, 369). That case holds that a statement that the instrument sued on is in the possession of the attorney, with the additional averment that the "instrument is the source of deponent's information and belief," is a substantial compliance with the requirement of the Code in that regard. It also holds such statement a compliance with the requirement of the Code as to the reason why the attorney verifies, without any additional averment. There seems no good reason why such additional averment may not be omitted in the one case as well as in the other.

In *Smith v. Rosenthal* (11 *How. Pr.* 442), one of the ablest of the early interpreters of the Code held that when the action or defense is upon a written instrument in possession of the agent or attorney, both requirements of the Code are complied with by stating the fact of possession, and that the legislature have virtually declared that the possession of the instru-

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ment is a sufficient ground of belief of the truth of the pleading, and also is a sufficient reason why the verification is not by the party. The general term in Hyde v. Salg, cites Smith v. Rosenthal, in support of their decision and adopt its conclusion to the extent required by that case.

The motion is denied, but without costs.

IN RE ALLEGED CONTEMPT OF ALLISON C. CRARY,
ETC.

SUPREME COURT, THIRD DEPARTMENT, ST. LAW-
RENCE COUNTY, SPECIAL TERM, NOVEMBER, 1885.

§§ 650, 351, 837.

Attachment—Right to and extent of examination of party claimed to be indebted to or to have property of defendant in—When disobedience of order for such an examination is a contempt.

The fact that an order for the examination of one indebted to or having property of an attachment debtor was granted without jurisdiction would be a complete answer to a motion to punish the person sought to be examined for disobeying it, but the fact that it was improvidently granted is not an excuse.^[1]

Where the affidavit of a deputy sheriff on which an order for the examination under section 861 of the Code of Civil Procedure, of a person asserted to be indebted to the defendant in an attachment, referred to the attachment and certain certificates filed with the clerk of the court as having been served by him, and stated that he desired to base his application for the order on such paper,—*Held*, that such attachment and certificates might properly be considered as part of the moving papers on which the order was granted.^[2]

Where it appeared that the certificate demanded by a sheriff holding an attachment from one claimed to have property of and to be indebted to the defendant in the attachment was only of his indebtedness to such defendant,—*Held*, that upon his failure to give the certificate

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such person could be examined under section 651 of the Code of Civil Procedure, only as to his indebtedness to the defendant in the attachment,[³] and ought not to be compelled to submit to an examination beyond that.[³]

Upon such an examination the fact that the answers of the witness to questions put on cross-examination will prejudice a litigation likely to arise between the sheriff or the plaintiff in the attachment, and the witness, will not excuse him from answering, [³] and where the witness denies that he has property of the defendant, or is indebted to him, such denial does not prevent further examination to enable the sheriff to determine, as he must at his peril, whether the party examined really has property of or is indebted to the defendant, [⁴,⁵] and the sheriff is entitled to have the party answer all pertinent questions bearing on these points.[⁴]

(*Decided November 7, 1885.*)

Motion by the sheriff of St. Lawrence county to punish Allison C. Crary for refusing to submit to an examination before a referee ordered pursuant to section 551 of the Code of Civil Procedure.

The sheriff of St. Lawrence County holding an attachment issued against the property of the defendant in an action brought in this court by Loyal L. Jackson against Nathan Case Crary, upon proof showing service of a copy of the attachment on Allison C. Crary, and his refusal to give the certificate demanded by the sheriff pursuant to section 650 of the Code of Civil Procedure, procured an order for the examination of said Allison C. Crary before a referee as to the amount, nature and description of property held by him for the benefit of the defendant or of the defendant's interest in property so held and debts or demands owing to the defendant. He appeared before the referee, and after testifying to the effect that he had not any property of the defendant or in which he was interested, and that he was not indebted to him, refused to answer other questions.

Thereupon this motion was made.

In re Crary.

H. D. Ellsworth, for sheriff and motion.

J. C. Keeler, for Allison C. Crary, opposed.

TAPPAN, J.—Upon the hearing, counsel for Allison C. Crary made a preliminary objection to the order and papers upon which the same was granted. First, because the order was improvidently granted. Second, because the party sought to be punished appeared before the referee and answered all proper questions.

['] If the order was granted without jurisdiction, that would be a complete answer to this motion; that it was improvidently granted, furnishes no excuse to the party required to submit to the examination for disobeying it.

The attachment and certificates served upon defendant in the suit of Loyal L. Jackson *v.* Nathan Case Crary, and the sheriff's certificate of such service, ['] which were filed with the clerk, before Deputy-sheriff Murphy made his affidavit, and which he therein referred to as having been served by him, and stated that he desired to base his application for the order on such papers, may properly be considered as part of the moving papers on which the order for the examination was granted.

Murphy's affidavit stated that he had demanded a certificate with reference to any property of the defendant in the attachment suit, which the said Allison C. Crary held, and also with reference to any debt which he owed said defendant; an examination of the certificate in writing which Murphy delivered to Allison C. Crary only shows that he demanded a statement of his indebtedness to the defendant.

['] The order for an examination of Allison C. Crary, for want of a certificate could properly only authorize such examination with reference to his indebtedness to the defendant, and beyond that

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he ought not to be compelled on this motion to submit to an examination, and he will not be charged with the costs of this motion (*Code of Civil Procedure*, §§ 650, 651).

The scope of the examination authorized by section 651, *Code of Civil Procedure*, may be better understood by the decisions that have been made under that section, which determine some things that it will not permit. If a party indebted to the defendant, or having his property in his possession, refuses to give the certificate provided for in section 650, he may be required to submit to the examination authorized by section 651, *Code Civil Procedure*, but upon or after such examination he cannot be required to give a certificate; the examination is a substitute and in place of the certificate (*Buckingham v. White*, 1 *N. Y. Civ. Pro.* 365, S. C., 25 *Hun*, 441).

If it appears upon such examination, that the party examined has property of the defendant, capable of actual manual delivery, the court or judge has no power to order its delivery to the sheriff; but the sheriff must obtain such property by an action or proceeding instituted under section 655, *Code of Civil Procedure* (*Hall v. Brooks*, 25 *Hun*, 577; S. C. reversed, 89 *N. Y.* 33; 2 *N. Y. Civ. Pro.* 198).

If the property sought to be attached is capable of caption and delivery, until the sheriff obtains the actual custody of it, he can make no levy, and can acquire no interest in it by virtue of the attachment (*Anthony v. Wood*, 29 *Hun*, 239; S. C., reversed and above doctrine declared, 19 *N. Y. Weekly Dig.* 177*).

The certificate or the testimony of a party, examined because he has not furnished a certificate, is evidence against the party giving it, in an action by the sheriff or attaching creditor, but does not estop such party from showing the truth to be otherwise in such

* S. C., more fully reported, 6 *N. Y. Civ. Pro.* 164.

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action (*Almy v. Thurber*, 3 *N. Y. Civ. Pro.* 351 ; S. C., 12 *Abb. N. C.* 459 ; 65 *How. Pr.* 481).

We will next consider matters bearing directly upon the scope of such examination. The object of the provisions of sections 650 and 651, Code of Civil Procedure, is to furnish adequate means to enable the sheriff to ascertain whether any party has property of the defendant, or is indebted to him, that the sheriff may take proper measures to levy his attachments upon such property or debt. If the party requested to make such certificate denies that he has property of or owes the defendant, such denial does not excuse the making of the certificate. If the party requested refuses to make a certificate, he may be required to submit to an examination, and if he makes a certificate, and the sheriff can make it appear by affidavit to the satisfaction of the court or judge, that it is untrue, or that it fails fully to set forth the facts required to be shown thereby, the party may be required to submit to the examination authorized by section 651, Code of Civil

Procedure. On such examination, if the party [4] denies that he has property of the defendant or is indebted to him, such denial does not prevent further examination to enable the sheriff to determine, as he must at his peril, whether the party really has property of or is indebted to the defendant.

[5] It was strenuously argued upon the argument, that when it appeared that the party required to be examined had had dealings with the defendant, and that litigation was likely to arise between the sheriff and such party, or the plaintiff in the attachment case, he ought not to be required to submit to a cross-examination, that might prejudice him in such possible litigation. The answer to this is, that in such proceeding nothing can be adjudged against him, and in addition the provisions of section 837, that a competent witness shall not be excused from answer-

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ing a relevant question on the ground only, that the answer may tend to establish the fact that he owes a debt or is otherwise subject to a civil suit serves to fully answer the objection. This rule has always been enforced in proceedings supplemental to execution, in which a party subpœnaed as a witness can be required to answer any question that can in any manner bear upon the question as to whether the judgment-debtor has property or rights in action, which ought to be subjected to the payment of the judgment. In that proceeding, as in this, nothing can be determined or adjudged against the witness. Both proceedings are in aid of contemplated future legal proceedings, to reach the defendant's property to satisfy the debt, and there is no more reason in the one case than the other, that the contention here urged should prevail. A witness in either case has no right, as a matter of law, to insist that he knows the effect of the facts which may be disclosed on his examination to be that he has no property of and owes no debt to the defendant. When called as a witness, he must state facts upon these points which are to be used by the sheriff to enable him to take such action as the law requires under the attachment.

['] The authorities are all to the effect that the sheriff is not bound to take the general denial of the party being examined, as to whether he has property or owes a debt to the defendant, but is entitled to have the party answer all pertinent questions bearing upon these points.

In *Baxter v. Missouri, K. & T. Railway Co.* (4 *Hun*, 630), decided under section 236, Code of Procedure, it was held that an order requiring the debtor of the defendant to appear and be examined, made on account of his refusal to give the certificate required by that section, will not be vacated on an affidavit of such debtor stating that the funds in his hands are held in

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trust and cannot be applied in payment of the plaintiff's debt ; that the attaching creditor is not bound to take the statement of the debtor as to the character in which the money is held by him, but is entitled to the examination provided for by the Code.

The same doctrine was held under section 651, Code Civil Procedure, in *Glen Cove Starch M'f'g Co. v. Gott-hold*, 1 *N. Y. Civ. Pro.* 366, *note*. To the same effect is *Rutter v. Boyd*, 3 *Abb. N. C.* 6, and *Ess v. Toplanyi*, 4 *N. Y. Civ. Pro.* 173, decided in the city court of New York. Although there is some language in the opinion that seems to support the contention of Crary's counsel in this case, yet when the text of the decision is considered it cannot be seen that it actually does.

In accordance with the views above expressed, Allison C. Crary ought to have answered all the questions put to him which in any manner tended to show whether he was indebted to the defendant Nathan Case Crary or not, and for his refusal to answer such questions he is adjudged guilty of contempt and is required to appear before the referee at a day to be named and answer all such questions, and for his further refusal so to do he will be adjudged guilty of willful contempt and will be subjected to punishment accordingly. If he shall submit to such further examination and answer such questions, the same shall operate to purge him of the offense already committed.

In re Savin.

IN RE APPLICATION OF SAVIN AND ANOTHER, ETC.

SUPREME COURT, FIRST DEPARTMENT, NEW YORK
COUNTY, SPECIAL TERM, MARCH, 1886.§§ 914, *et seq.*, 915, 917.*Subpœna—When not issued to take testimony for use in action pending in court of foreign country.*

A subpœna cannot issue for the taking of the testimony of a witness, to be used in an action pending in a court of a foreign country, where a commission has not been issued or other proceedings taken in such court for the purpose of taking the testimony of witnesses, and that although it appears that an affidavit taken before an officer authorized to administer affidavits whose official character is certified to by the consul of such country, may be read in evidence in its courts.

Section 917 of the Code of Civil Procedure, providing for the issuing of a subpœna to take the testimony of a witness in an action, suit or special proceeding, pending in a court of another State or of a Territory, or of the United States, does not authorize the granting of such a subpœna to take testimony for use in an action pending in a court of a foreign country.

(Decided March 22, 1886.)

Motion to dismiss subpœna.

A subpœna was issued by Mr. Justice LAWRENCE upon the application of Francis W. Savin and another for the examination of Charles E. Quincey before him at chambers of the supreme court in New York county on March 20, 1886, in an action pending in the city of Paris, France, brought by the applicants against William E. Heath and his wife.

The affidavits on which the subpœna was granted, set forth the recovery in the supreme court of this State, on January 29, 1885, of a judgment against Wil-

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liam E. Heath and Charles E. Quincey ; the commencement of a suit thereon against said Heath and his wife in the City of Paris, France. to secure the application of certain property of Mrs. Heath to the payment of the judgment which is asserted to be applicable thereto according to the laws of France ; "that in order to apply real estate which stands in the name of Mrs. Heath, to the debts of William E. Heath, it is necessary to show that said property did not come to her as part of her dowry, was not purchased with her dotal fund, she did not own it prior to her marriage, and that it did not come to her subsequent to her marriage by inheritance or devise ;" that said Quincey is able to testify to these points, and that his testimony is necessary and material to the successful prosecution of the action ; that "according to the laws of the Republic of France, an affidavit taken in any country before an officer authorized to take an affidavit whose official character is certified to by the French consul is admissible in evidence in the courts of the Republic of France," and asked that the said Quincey be examined under article 3, title 3, chapter 9 of the Code of Civil Procedure.

On the day named in the subpœna for the examination, Mrs. Heath, one of the defendants in said action, appeared and made this motion.

Paul Fuller (Coudert Brothers, attorneys), for the motion.

Henry A. Root, for applicants, opposed.

LAWRENCE, J.—This cause does not come within the provision of section 915 of the Code of Civil Procedure, because no commission has issued from France, nor has any notice been given by, or any other proceeding taken in the French courts for the purpose of

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taking the testimony of the witnesses, so far as the papers before me disclose. The issuing of such commission, or the giving or taking of such notice or proceeding, is the basis of the authority of the justice to issue the subpoena.

Section 917 of the Code refers only to the taking of testimony in actions, suits or special proceedings pending in the courts of another State or of a Territory, or of the United States. It does not apply to actions, &c., pending in courts of another country.

The motion to set aside, the subpoena will therefore be granted, but, as the point seems never to have been adjudicated, no costs will be imposed.

WALSH v. THE BOWERY SAVINGS BANK.

CITY COURT OF NEW YORK, SPECIAL TERM, APRIL,
1886.

§§ 1186, 1225, 3251 subd. 3.

Special verdict—Costs of motion for judgment on.

Where a special verdict was rendered by the jury on one of the questions involved in an action, and the other question was reserved to be determined by the trial judge, and motions were made by both parties for judgment on the special verdict, and submitted on briefs,—*Held*, that the successful party was entitled to \$20 costs before argument and \$40 costs for argument of his motion for judgment. Where the statute contains a fee bill allowing absolutely specified items there is no power in the court to add to or deduct from them, and the sums specified go to the successful party, as of course. (*Decided, April 1, 1886.*)

Motion under section 3265 of the Code of Civil Procedure, for a new taxation of costs.

Walsh v. Bowery Savings Bank.

The action was brought to recover moneys deposited with the defendant, by one Mary^d Duffy, now deceased, to which the plaintiff claimed title by gift from her. The action was tried before Mr. Justice McADAM and a jury, March 12, 1886. At the close of the evidence, the court submitted the following question to the jury, viz: "Did Mary Duffy deliver the bank book to the plaintiff with intent of passing title to the fund on deposit?" to which the jury answered "yes." The trial judge reserved the question of notice of the transfer and demand for the the money to be determined by himself, and a motion was made by the plaintiff, and also by the defendant for judgment on the special verdict, which motions were submitted on briefs.

Thereafter, the court ordered judgment in favor of the plaintiff on the special verdict for the amount claimed. The plaintiff presented to the clerk for adjustment a bill of costs containing the following items: "Application for judgment on special verdict before argument \$20; application for judgment on special verdict, for argument \$40" which the clerk on objection by defendant disallowed and struck out. Thereupon the plaintiff made this motion.

William H. Regan, for plaintiff and motion.

Norwood & Coggeshall, for defendant, opposed.

McADAM, C. J.—A special verdict is one by which the jury find the facts only, leaving the court to determine which party is entitled to the judgment thereupon (*Code of Civil Procedure*, § 1186). This is the form of verdict which the jury were directed to and did find in this case. Both sides moved for judgment upon it, and the court held that the plaintiff was entitled to judgment thereon (*Code*, §§ 1186, 1225).

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The new Code provides, that "there shall be allowed to either party upon an application for judgment upon a special verdict, the same sums as upon an appeal as prescribed in subdivision fourth" of the same section (*Code*, § 3251, subd. 3). The sums prescribed in the fourth subdivision are "before argument \$20, and for argument \$40." Section 1225, *supra*, provides, that the application for judgment after trial by jury, of the specific questions, "may be made as upon a motion;" motion costs ordinarily amount to \$10 only.

An appeal from an order made on a motion "is really and in fact, a continuation of the motion in the same court on appeal," and motion costs only on affirmance or reversal are allowable (*Phipps v. Carmen*, 26 *Hun*, 518). Ten dollars costs for the argument of the motion for judgment ought to be sufficient, but section 3251, subd. 3, allows "the same sums" prescribed in subdivision four, which aggregate \$60 and leaves no discretion in the court as to awarding or withholding them. This is the plain language and effect of the subdivision, and I cannot change it by interpolating words, which might give to it the meaning which the defendant's counsel claims it ought to have. The legislative intent, the grand central light in which all statutes must be read, is to be sought for in the language used (*Hudson Iron Co. v. Alger*, 54 *N. Y.* 173). When the statute contains a fee bill allowing absolutely specified items, there is no power in the court to add to or deduct from them, and "the sums specified" go to the successful party as of course (*Downing v. Marshall*, 37 *N. Y.* 380).

Under the circumstances the plaintiff is entitled to tax the \$60 aforesaid and the motion, under section 3265 for "a new taxation," must be granted, to the end, that the \$60 rejected by the clerk on the taxation already had, may be allowed.

Browne v. Browne.

BROWNE v. BROWNE.

SUPREME COURT, FOURTH DEPARTMENT, ONEIDA
COUNTY, SPECIAL TERM, FEBRUARY, 1886.

§ 1769.

Action for separation.—When alimony not allowed in.—When counsel fee granted.

Where, in an action by a wife for a separation from her husband, the merits of the plaintiff's cause of action are doubtful, she is not entitled to alimony during the pendency of the action;[¹] in such an action the wife must make it appear that she has been injured and present a meritorious cause of action before she should be allowed temporary alimony.[²]

A wife should be allowed counsel fee in an action brought by her against her husband for a separation, when her own statement makes out a *prima facie* case, and her income is not sufficient to support her and defray the expenses of the suit,[³] but in determining the amount thereof the probabilities as to the final result of the action may be considered, and when her ultimate success is improbable the allowance should be small.[⁴]

(Decided February 6, 1886.)

Motion by plaintiff, in an action brought by her to procure a separation from the defendant, her husband, for alimony and counsel fee *pendente lite*.

The opinion states sufficient facts.

Parker W. Tefft, for plaintiff.

George W. Smith, for defendant.

VANN, J.—I have carefully read the voluminous papers presented upon this motion, including the letters written by the plaintiff and her mother to the defendant. The material inference to be drawn from the letters of the plaintiff is inconsistent with the

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material allegations in her complaint and petition. These letters, and the affidavits of sixteen different persons read on behalf of the defendant, throw doubt upon the merits of the plaintiff's cause of action, [1] and hence, according to the established practice, she is not entitled to alimony during the pendency of the action.* *Bertschy v. Bertschy*, 14 *N. Y. Weekly Dig.* 111; *Solomon v. Solomon*, 28 *How. Pr.* 218; *Bissell v. Bissell*, 1 *Barb.* 430.

[1] These authorities, and many others to the same effect that might be cited, hold that in an action for separation the wife must make it appear that she has been injured, and present a meritorious cause of action, before she should be allowed temporary alimony.

A different rule, however, prevails as to a counsel fee, which will be allowed on less evidence than is held necessary to secure an allowance for alimony. *Douglas v. Douglas*, 13 *Abb. Pr. N. S.* 291; *Bertschy v. Bertschy*, *supra*.

[2] The principle governing the subject, as laid down by these cases, is that the wife should be granted a counsel fee when her own statement makes out a *prima facie* case, and her income is not sufficient to support her and defray the expenses of the suit.

[4] The reason of the rule as stated by Mr. Justice BRADY, in *Douglas v. Douglas* (*supra*), is that "it does not follow that the plaintiff may not maintain her complaint, although it is seemingly answered." In determining the amount of the counsel fee, however, the probabilities as to the final result of the action may be considered, and when the conflict of evidence relating to the charges upon which the plaintiff's case

* Section 1769 provides for the granting of alimony and counsel fee *pendente lite* in actions for separation.

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rests renders her ultimate success improbable, the allowance should be small. *Id.*

An order may be entered denying the application of the plaintiff for temporary alimony, but directing the defendant to pay the sum of \$75, within twenty days, to enable the plaintiff to carry on this action.

HUNTINGTON v. HUNTINGTON, ET AL.

SUPREME COURT, FOURTH DEPARTMENT, ONEIDA
COUNTY, SPECIAL TERM, FEBRUARY, 1885.

§§ 1532, *et seq.*

Partition.—Effect of, on inchoate right of dower.

Tenants in common of real property have an absolute right to a partition of the lands so held by them; either can by legal proceedings compel a partition,^[1,7] and the inchoate right of dower of a wife of one of the owners is not paramount to the right of her husband, or of his co-tenant, to compel a partition, and will not prevent it.^[1,2,7]

It seems, that where a partition of real estate held in common is made under the direction of the court it is "firm and effectual forever" and "binding and conclusive" upon the wives of the tenants in common, whether they consented to it or opposed it,^[3] and their inchoate rights of dower attach not to the undivided part of their husband's entire property, but to the portions allotted to their respective husbands in severalty.^[4]

Persons holding lands as tenants in common may, by interchange of deeds between themselves, either with or without the consents of their respective wives, make a partition of the lands, and a partition so made by them if fair and just, and equal quantity and quality considered would be as binding upon the wives as upon themselves,^[5,7,9] and their right of dower then attaches to the shares assigned to their respective husbands,^[4,7,9] but if fraud upon the

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wives is attempted by purposely making an unequal partition it would not be binding upon them.^[8]

Totten v. Stuyvesant (3 *Edw. Ch.* 500), followed.^[6]

(Decided February, 1885.)

Action for the recovery of dower, tried before the court at special term.

The facts are stated at length in the opinion.

Geo. M. Weaver, and *Smith N. Lindsley*, for plaintiff.

Wm. H. Bright, and *Francis Kernan*, for defendants.

VANN, J.—The premises affected by this action consist of four farms, known as the Phillips, Bingham, Morris and Bielby farms, and certain blocks of land in the city of Rome. For many years prior to 1841 all of this land was owned by two brothers, named George and Henry Huntington, as tenants in common. George died in 1841, leaving a will, whereby he devised his undivided half interest in said lands to his son Edward Huntington, who married the defendant Antoinette R. Huntington. By the will of Henry, who died in 1846, the other undivided half passed to his son Benjamin N. Huntington, who subsequently married the plaintiff. From the date last named until March 8, 1876, Edward and Benjamin Huntington owned, occupied, and carried on said farms, as tenants in common. They kept regular books of account showing the annual products, expenses and income. Each made entries in said books, and each knew the condition and value of said property, and the net income therefrom. For several years prior to 1876, Edward Huntington went to the farms only once or twice a week on an average, while Benjamin had the

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principal charge and was thoroughly acquainted with the comparative value of the several parcels of land.

Said farms and blocks are contiguous and form a single tract, crossed by the Mohawk River, the Black River Canal and by several highways. Although differing somewhat in details they possess the same general characteristics of soil and surface, and for farming purposes do not greatly differ in value. The Phillips and Morris farms and the Bingham farm east of the Black River Canal are chiefly valuable for farming purposes, while the Bielby farm and the blocks have in addition to their value as farming lands a large prospective value on account of their nearness to the built portion of the city of Rome, and are plotted and laid out in streets and blocks on the official map of said city.

In 1872, proceedings were commenced in surrogate's court, against Benjamin Huntington for an accounting in a matter of considerable magnitude and which, it was apprehended might result in a large judgment against him. Said accounting continued more than four years and did not terminate until in April 1876. As early as 1871 or 1872, Edward Huntington desired to have a partition of all the real estate that he had in common with Benjamin and repeatedly said so to Benjamin's counsel and intimate business associates. Both Edward and Benjamin were advised by eminent counsel that "it was entirely proper and right that a division should be made of these lands" and both regarded the proposed division as important and desirable. Prior to March, and as early as January, 1876, Benjamin became insolvent. While Edward knew that his co-tenant was embarrassed financially, he did not know and did not believe that he was insolvent, but thought that he had property enough to pay his debts. He feared, however, that complications might arise between himself and Benjamin's creditors, if

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judgments should be recovered, that would be an embarrassment in the management of the real estate unless a partition was had. For a number of years, Benjamin had been afflicted with palsy which made it difficult for him to walk. His general health, however, was good, and his mental powers were unimpaired.

The negotiations between these tenants in common, culminated about March 8, 1876, in an agreement for the voluntary partition of their lands, except two lots known as the Office and Perry lots. Two partition deeds were prepared by Edward, each dated March 8, 1886, one from Edward and wife, as grantors, to Benjamin, as grantee, and the other from Benjamin and wife to Edward. Each deed recites a consideration of one dollar and states that its object is to make "partition and division of certain lands held and owned in common by the parties." Each purports to convey an undivided half of certain farms and city lots and each contains a covenant, in the usual form, for quiet and peaceable possession.

The last paragraph, prior to the attestation clause, in each deed, is as follows; "This deed is executed concurrently with a deed from said party of the second part to said party of the first part, conveying certain other lands which together with those above described were held in common by the parties to this indenture and by the two deeds are divided and partitioned by mutual agreement."

Neither deed had any other object or consideration than the partition thereby effected.

On the evening of March 9, 1876, Benjamin Huntington and the plaintiff, his wife, executed one of said partition deeds by signing and sealing the same, which by its terms purported to convey, release and confirm to Edward Huntington as his share of the land held in common an undivided half of the Phillips farm of 436.83 acres, the Bingham farm east of the canal of

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152.65 acres and blocks 2, 13, 14, 15, 16, 23, 26, 28, 34, 36, 37, 43 and 50 ; parts of three blocks north of Chestnut street, one half acre on the Turin road, twelve city lots on William and Bloomfield streets and eight lots on James and Dean streets, aggregating about 66.70 acres in addition to said farms. At about the same time Edward Huntington and his wife, Antoinette, one of the defendants, executed the other partition deed by signing and sealing the same, which by its terms purported to convey, release and confirm to Benjamin Huntington, as his share of the lands held in common, an undivided half of the Bielby farm of 140.79 acres, The Morris farm containing 385 acres, including the bed of the Mohawk River, and 367.36 acres, exclusive of the river, blocks 6, 8, 11, 18, 19, 20, 21, 24, 25, 29, 30, 33, 35, 41, 42, 44, 45, 51, 52, and 53, eleven city lots on Jay, Bloomfield and Thomas streets, and eleven lots on Gordon, James and Dean streets, aggregating about 78.24 acres, in addition to the farms.

On the morning of March 10, 1876, Mrs. Edward Huntington duly acknowledged the execution of the deed, signed the night before, and the officer who brought it to her for that purpose took it away with him, and she never saw it again until the trial of this action. On the same morning, the plaintiff refused to acknowledge the execution of the deed signed by her, and on account of such refusal Edward Huntington erased his own wife's signature and acknowledgment from the other deed, but without her knowledge or consent. Both deeds were delivered and recorded in this condition on March 10, 1876, since which date Edward and Benjamin Huntington, their heirs, devisees and grantees, respectively, have held exclusive possession of the respective shares thus mutually conveyed and partitioned.

It does not appear that the plaintiff made any objection to the delivery of the deed as signed by her,

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or that she has ever sought to cancel or repudiate her signature. It does appear that Edward Huntington, when he placed the deeds upon record, supposed or at least had been advised that they had no effect upon the respective inchoate rights of dower.

Said partition, although unequal in quantity, as Edward received the greater number of acres, was fair, just and equal on the basis of market value at the time it was made. The part allotted to Benjamin yielded less annual income than the other, but it had the greater value per acre, as it was more available for city purposes. Each of the tenants in common was well acquainted with the property divided, and each intended to make and believed he did make an equal division.

On April 7, 1876, said Benjamin Huntington made a general assignment of all his property, including his part of said partitioned lands, for the benefit of his creditors. His assets, according to the inventory, amounted to about \$160,000, and his liabilities to about \$200,000, including two judgments of \$95,000 each, the result of said accounting before the surrogate, which was not yet known at the date of said partition.

In February, 1877, the assignee advertised the assigned real estate for sale at public auction, and described the lands allotted to Benjamin Huntington upon said partition, as his sole and separate property at the date of the assignment.

By the printed terms of the sale, the lands advertised were offered subject to the inchoate right of dower of the plaintiff, who attended the sale and was present when the advertisement and said terms were publicly read. The Morris and Bielby farms were struck off to her at such sale, but they were never conveyed to her, as she failed to complete the purchase. All of the lands conveyed to Benjamin by the partition deed were sold by the assignee subject to the full

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inchoate right of dower of the plaintiff therein, in severalty.

Edward Huntington purchased at the sale and subsequently, the undivided half of the office and Perry lots and also blocks 24, 25, 29, 30, 35 and 42 and lots 1, 2, 3, 4, 8, 9, 12, 13 and 14 in block No. 8, which were a part of Benjamin's share upon the partition.

Said Edward Huntington died April 17, 1881, leaving a last will and testament, which has been admitted to probate, and by which, after making certain provisions for his widow, the defendant, Antoinette R. Huntington, in lieu of dower, he devised all of his real estate to his five children, defendants in this action, share and share alike.

Said Benjamin Huntington died November 10, 1882.

About March 10, 1882, the defendant Antoinette R. Huntington caused notices to be served upon certain persons who had purchased at the assignee's sale, a part of Benjamin's share, according to the partition, stating in substance that she claimed dower therein. In about two weeks, however, she countermanded said notices and informed the persons upon whom they had been served that she had decided to accept the conditions of her husband's will. She has in fact accepted those conditions in lieu of dower.

The plaintiff commenced this action October 23, 1883, to recover her dower.

She claims that she is entitled to dower (1) in the undivided half of the Office and Perry lots, which although held in common, were never partitioned,—this claim is not disputed—(2) full dower in severalty in the lots, blocks and farms allotted to her husband upon the partition,—this claim is not disputed by the defendants, nor, so far as appears by any one,—(3) in the undivided half of all the lands allotted by the partition to Edward Huntington, thus claiming dower

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in three-fourths of all the partitioned lands,—this claim is disputed by the defendants, who insist that the plaintiff is not entitled to dower in any of the lands conveyed to Edward Huntington upon the partition.

It is provided by section 1532 of the Code of Civil Procedure that “where two or more persons hold and are in possession of real property, as joint tenants or as tenants in common, in which either of them has an estate of inheritance, or for life, or for years, any one or more of them may maintain an action for the partition of the property, according to the respective rights of the persons interested therein; and for a sale thereof, if it appears that a partition thereof cannot be made, without great prejudice to the owners.”

Similar provisions were in force in March, 1876, when the partition in question was made (2 R. S. 317, part 3, ch. 5, tit. 3, § 1; *Code of Pro.* § 448). Both Edward and Benjamin Huntington, therefore, had the absolute right to a partition of the lands held by ['] them in common. Either could have compelled the other by legal proceedings to submit to a partition, even if the wives of both had been opposed to it.

A wife's inchoate right of dower is not paramount ['] to the right of her husband's co-tenant to compel a partition (*Freeman on Cotenancy and Partition*, § 411).

['] If partition had been made by commissioners under the direction of the court, it would, in the language of the statute, have been “firm and effectual forever” and “binding and conclusive” upon the plaintiff, whether she consented to it or opposed it (2 R. S. 322, § 44).

['] Her inchoate right of dower, in that event, would have no longer attached to an undivided half of the entire property, but would have attached to the portions allotted to her husband in severalty

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(*Id.*; *Matthews v. Matthews*, 1 *Edw. Ch.* 564, 567; *Wilkinson v. Parish*, 3 *Paige*, 653, 658; *Rosekrans v. White*, 7 *Lans.* 486).

This seems always to have been the law of our State, although under an old statute it was held that where a sale was decreed instead of an actual partition, the wife's inchoate right of dower was not affected thereby, upon the ground that a sale divests the title, while partition operates only upon the right of possession, each tenant being deemed seized of his original title (*Jackson v. Edwards*, 22 *Wend.* 498, 512; *S. C.*, 7 *Paige*, 386).

Even the lien of a creditor, not a party to the proceeding, upon the undivided interest of a tenant, is, by force of the statute, a charge only on the share assigned to such tenant in the partition (2 *R. S.* 318, §§ 11, 12; *Harwood v. Kirby*, 1 *Paige*, 469; *Halsted v. Halsted*, 55 *N. Y.* 442).

Whatever either of the Messrs. Huntington could have compelled the other to do by legal proceedings in the way of partition, he had the right to do voluntarily (*Freeman on Cotenancy and Partition*, § 411; *Bavington v. Clark*, 2 *Penn.* 124; *Calhoun v. Hayes*, 8 *Watts & Serg. [Pa.]* 127; *McMahan v. McMahan*, 1 *Harris [13 Pa. St.]* 380).

[⁵] They therefore had the right to make partition of their lands held in common, either with or without the consent of their respective wives; and a partition so made by them, if fair, just and equal, "quantity and quality relatively considered," would be as binding upon their wives as upon themselves (*Id.*; 2 *R. S.* 322, § 38; *Totten v. Stuyvesant*, 3 *Edw. Ch.* 500).

[⁶] In the case last cited, the vice-chancellor said: "The first objection is that the deeds of release confirming the partition and mutually releasing to each other the parcels in severalty, were not executed

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by the wives of the tenants in common ; and hence it is apprehended that those *femes covert* may still claim their rights of dower in undivided shares of the estate as though no partition had been made."

After stating that there was no proof that the partition was not made in good faith or that it was unequal, he continued: "Under such circumstances the dower rights attach to the shares in severalty of the respective husbands. If ever those *femes covert* come to assert such rights they will be restricted, both in law and equity, to the allotments of their husbands, and will be estopped from seeking to have dower assigned on undivided shares of other parcels. By confining them to the equal shares which their husbands take in the partition, they have all the dower that the law gives them. This seems so clear a proposition in itself as to require the citation of no authorities."

This is the leading case upon the subject, and counsel upon either side appear to recognize it as sound law.

All the authorities and text-writers lay down the same rule, although not always so clearly expressed.

['] The principle underlying the cases seems to be that partition is an absolute right to which inchoate dower rights are subordinate ; that as it may be compelled by law it may be done voluntarily ; that as judgment in partition only severs the unity of possession, and does not confer any new title, so an amicable partition by interchange of deeds has the same effect ; and that, as the husband's title is not affected, the wife's right depending on, and attached to that title is not affected (*Freeman on Cotenancy & Partition*, §§ 86, 411 ; 1 *Scribner on Dower*, (2 ed.) p. 341 ; 2 *Id.* p. 590 ; *Park on Dower*, 345 ; 1 *Hilliard on Real Estate*, 157, 592 ; 1 *Washburn on Real Property*, 158 ; *Gerard's Title to Real Property*, 166 ; *Wade v. Devoy*,

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50 *Cal.* 376 ; Goundie v. Northampton Water Co., 7 *Pa. St.* 233 ; Williard v. Williard, 56 *Id.* 119 ; Moshier v. Moshier, 32 *Me.* 412 ; Potter v. Wheeler, 13 *Mass.* 506).

[¹] If a fraud upon the wife should be attempted by purposely making an unequal partition, the two cases last cited hold that it would not be binding upon her.

This seems to be the only exception to the general rule ; and fraud is an exception to all rules, avoiding the most solemn acts and agreements.

[²] I am of the opinion, therefore, that the plaintiff is not entitled to dower in the lands allotted to Edward Huntington on the partition. She is entitled to dower in an undivided half of the Office and Perry lots and to full dower in the lands allotted to her husband on the partition, of which, however, only the part subsequently purchased by Edward Huntington can be recovered in this action.

The effect of plaintiff's signature to the partition deed ; of her claiming full dower in lands which her husband owned in severalty only by virtue of the partition deed and of her conduct at the assignee's sale, is not passed upon, as the conclusion already reached makes it unnecessary.

Findings may be prepared and a decree proposed settling the rights of the parties in accordance with these views ; both to be settled upon a notice of two days.

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BILLINGS, ET AL., RESPONDENTS, v. PICKERT,
ET AL., APPELLANTS.SUPREME COURT, FIRST DEPARTMENT, GENERAL
TERM, MARCH, 1886.§§ 2149 *et seq.*, 2164, 2165, subd. 2.*Discharge of insolvent from his debts—Service of order to show cause—
Jurisdiction—What record must show.*

In a proceeding under sections 2149 *et seq.* of the Code of Civil Procedure,—providing for the discharge of an insolvent debtor from his debts,—service of the order to show cause “why an assignment of the insolvent’s property should not be made, and he be discharged from his debts” is jurisdictional, and must be served, when not served personally, by depositing it at least forty days before the return day, “in the post-office inclosed in a post-paid wrapper addressed to the creditor at his usual place of residence.” Where such wrapper is addressed to the creditor “at his place of business” the service is not sufficient to confer jurisdiction upon the court to adjudge the discharge, and a discharge where the record shows service upon a creditor in that manner will not prevent a recovery by the creditor in an action brought by him upon a claim due him at the time of the discharge.

The record in a proceeding by an insolvent debtor for a discharge from his debts must show how the order to show cause why an assignment of his property should not be made and he be discharged from his debts was served; and where the record does not show that the court acquired jurisdiction of the person, the fact that it did obtain jurisdiction cannot be shown by parol evidence.

(Decided March 5, 1886.)

Appeal by defendant from judgment in favor of the plaintiff, entered upon verdict rendered by direction of the court.

The nature of the action and other facts are stated in the opinion.

Billings v. Pickert.

Abram Wakeman (Wakeman & Latting, attorneys), for defendant-appellant.

William P. S. Melvin, for plaintiff-respondent.

DAVIS, P. J.—This action was brought for goods sold by the plaintiffs to the defendants between November 11, 1878, and April 18, 1879. On the trial it was admitted by stipulation that the defendants, as copartners, under the name of Pickert & Co., bought from the plaintiffs, as copartners, under the name of Billing & Wetmore, from and including November 11, 1878, down to and including April 13, 1879, goods, wares and merchandise, of the value of \$2,116.89, and that the sum became due and payable on May 1, 1879, and that no part has been paid. The defense was a discharge under the provisions of the Code of Civil Procedure,* which have taken the place of the provisions of the Revised Statutes, familiarly known as the Two-thirds Act. The proceedings for the discharge were had in the county court of the county of Herkimer, in this State, and are quite fully set forth in the answers of the defendants.

On the trial, the plaintiff's counsel moved the court to direct a verdict for the plaintiff, on the ground that the record of discharge recited in the answer showed that the order,† made by the county court was required by its terms to be served upon each of the creditors of the said defendants, residing within the United States, by delivery of a copy of said order at least twenty days before July 23, then next, personally, or by depositing said copy at least forty days before that day

* § 2149 *et seq.*

† *I. e.*, the order provided for in section 2164 of the Code of Civil Procedure, requiring the creditors of the petitioner to show cause "why an assignment of the insolvent's property should not be made, and he be thereupon discharged from his debts."

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in the post-office, inclosed in a post-paid wrapper, addressed to the creditor at his place of business; that by section 2165 of the Code of Civil Procedure, subd. 2, it is required that said order, when served other than personally, shall be so served by depositing it at least forty days before the return day in the post-office, inclosed in a post-paid wrapper, addressed to the creditor at his usual place of residence; that by the terms of the answer it was averred that such order thus duly inclosed and post-paid, was addressed to the creditor's place of business, instead of his usual place of residence, and that the answer also alleged that the proof presented to the court set forth that the order was served at least forty days before July 23, 1883, by depositing it in the post-office inclosed in a post-paid wrapper, addressed to the creditor "at his place of business."

A reference to subdivision 2 of section 2165 of the Code, shows that the copy of the order, when served by mail, must be addressed to the creditor at his usual place of residence. The question thus presented to the court was whether the county court of Herkimer acquired jurisdiction to adjudge the discharge by proof of service by mail, in conformity to the directions of the order of that court, by depositing the notice in the post-office, addressed to the creditor at his place of business.

On motion of the defendant, an amendment of the answer was allowed by inserting therein that the defendant "served a copy of the order on the plaintiffs personally at their place of business and residence twenty days before the return day thereof;" and under such amendment the defendant offered to prove that he made such personal service upon the plaintiffs. This evidence was objected to and excluded by the court, and the defendant's counsel duly excepted. The plaintiffs did not appear in the proceeding, and

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there was nothing upon the face of the record to show that service was made in the form prescribed by the Code. By excluding the offer to prove personal service, the court held that the defect in the record could not be cured by such proof.

We are of the opinion, that the rulings of the court in excluding the evidence and directing the verdict were correct. The question was a jurisdictional one, and it has been held that where the record fails to show that the court acquired jurisdiction of the person, it cannot be shown by parol evidence that it did in fact obtain jurisdiction (*Noyes v. Butler*, 6 Barb. 613). It was essential that the record should show how the order to show cause was served. This requirement was sought to be complied with by showing that the order to show cause was served by mail, directed to the place of business of the plaintiffs. The law required it to be directed to the usual place of residence. The place of business and usual place of residence may be and often are identical, but they are not necessarily so, and where the statute expressly requires that the service shall be directed to the latter in order to confer jurisdiction, courts cannot hold that service by directing to the former is a compliance with the statute. We are of the opinion that the ruling of the court upon this question was correct, and that the judgment upon that ground must be affirmed. Other defects in the proceedings apparently fatal are now urged which were not suggested on the trial. But it is not necessary that we should pass upon them now, inasmuch as we regard the point upon which the court below passed as fatal.

The judgment should be affirmed.

DANIELS, J., concurred, BRADY, J., dissented.

In re Haxton.

IN RE APPLICATION OF HAXTON (APPELLANT),
FOR AUTHORITY TO MORTGAGE, LEASE OR SELL
REAL PROPERTY, &C.

ISAAC AKIN, EXECUTOR, &C., RESPONDENT.

COURT OF APPEALS, APRIL, 1886.

§§ 1337, 1822, 2717, 2718, 2750, *et seq.*

Appeal.—When assumed to have been decided on questions of law.—Surrogate's Court.—Surrogate has jurisdiction to try disputed claims in proceedings to sell, &c., real estate.—Short statute of limitations.

Where an order of the general term of the supreme court reversing a surrogate's decree, does not certify that it was based upon errors of fact, the court of appeals, upon appeal therefrom, must assume that the reversal was for errors of law.^[1]

It is undoubtedly the settled rule that a surrogate may not adjudicate upon a disputed claim as between an executor and a creditor upon an accounting, but that rule does not apply to a proceeding to mortgage, lease or sell real estate, which becomes a contest between the heir or devisee and the creditor;^[2] that is regulated by statute which clearly confers jurisdiction.^[3]

A surrogate has jurisdiction to try a disputed claim in a proceeding for the sale of a decedent's real estate for the payment of his debts.^[3, 4]

Section 1822 of the Code of Civil Procedure,—providing that a claim against a decedent's estate, disputed or rejected by the executor or administrator, is barred unless it is referred or an action commenced within six months after the dispute or rejection,—prior to its amendment in 1882 (*Laws of 1882*, ch. 399), did not apply except to claims presented after commencement of publication by the executor or administrator of notice to creditors to present their claims, and the amendment does not affect cases in which letters were issued before its adoption.^[5] Accordingly,—*Held*, that a creditor's claim against an estate was not barred by failure to refer it or commence an action on it within six months after its rejection by the

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executor, where letters testamentary were issued in 1879, and the executor had never advertised for claims.[⁴]

In re Haxton (33 *Hun*, 364), reversed.

(Decided April 13, 1886.)

Appeal from judgment of general term of supreme court, in the second department, reversing a decree of the surrogate of Dutchess county.

Reported below, 33 *Hun*, 364.

The appellant, William E. Haxton, on September 4, 1882, presented a petition to the surrogate's court of Dutchess county, alleging that he was a creditor of Sarah E. Akin, late of said county, deceased; and that she died September 7, 1879, leaving a will, which was duly admitted to probate by said court, October 23, 1879; setting out the recording of said will; the issuing of letters testamentary thereon to Isaac Akin, on that day; that no inventory of her personal estate had been made or filed; also facts showing that the decedent's personal property was insufficient to pay her debts; the nature and consideration of the petitioner's claim against the decedent; that it was presented to the executor on or about June 5, 1882, duly verified, and notice of its rejection was thereafter received; that the petitioner had been unable to ascertain what debts were left unpaid by the decedent; that the only claim known to the petitioner except the one due the petitioner before set out, was one due the petitioner as executor, &c., of Elnathan Haxton, deceased, and the nature of that claim; a description of all the real property within the State, of which the said Sarah E. Akin died seized; that it was worth the sum of \$1,800; that this property had been conveyed by Isaac Akin, legatee and executor, under the said decedent's will, to George McNish and Josiah Burnett, and the names of the tenants occupying it; that all

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the property, real and personal, left by said decedent, except \$1.00 each to her sons John J. Akin and Charles D. L. Akin, was by the will devised to Isaac Akin, her husband, and the names of the next of kin of the decedent, and asking "that a decree be made directing the disposition by mortgage, lease, or sale of the real property of said decedent, or so much thereof as may be necessary for the payment of her debts and funeral expenses, and that" all parties having an interest therein, and all creditors of the deceased "be cited to show cause why such a decree should not be made."

The only party appearing was Isaac Akin, who filed a written answer denying, among other things, that the decedent or her estate was indebted to the petitioner; setting up a counter-claim amounting to \$17,000, and alleging that the court had not jurisdiction to hear, try, and determine the matters in issue.

It appeared that the executor had not advertised for claims against the estate.

The surrogate, on July 12, 1882, made a decree herein, adjudging that the estate of the decedent has no just claim or set-off against the petitioner; that the estate of the decedent is indebted to the petitioner in the sum of \$1,608.56; that there was not sufficient personal property to pay the same; and making proper provision to sell the real property of the defendant for the payment of debts.

The executor alone appealed from that decree to the general term, and the decree was reversed and the proceedings remitted to the surrogate's court to dismiss the petition on the ground that the surrogate had no power to adjudicate upon a disputed claim.

From the decision and judgment of the general term the petitioner appealed to the court of appeals.

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Milton A. Fowler and C. B. Herrick (Herrick & Losey, attorneys), for petitioner, appellant.

A. M. & G. Card, for executor, respondent.

The only way for Haxton to have his claim adjudged valid after it had been rejected by said executor was by action. *Code of Civil Procedure*, § 1822; *Mowry v. Peet*, 88 *N. Y.* 453. If the claim was ever good it is now, and was, at the time the decree was obtained before the surrogate, July 12, 1883, barred by the statute of limitation. *Code of Civil Procedure*, § 1822. Where an executor or administrator disputes or rejects a claim against the decedent, unless the claim is referred the claimant must commence an action within six months after the dispute or rejection, or be forever barred from maintaining such an action and from every other remedy to enforce payment thereof out of decedent's property. *Code*, § 1822; *Selover v. Coe*, 63 *N. Y.* 438; *Elliott v. Cronk*, 13 *Wend.* 35. An application to sell lands for payment of a debt is not "an action" within the meaning of this section. *Redfield Sur. Pr.* 602. Section 2750 of the Code says, "any creditor of the decedent may present a petition to the surrogate, &c., and ask to have property sold for the payment of debts." That means a creditor whose claim has not been disputed or has been established by a competent court. A creditor holding a disputed claim cannot require a personal representative to account. *Code of Procedure*, §§ 2717, 2718. Then a creditor holding a disputed claim cannot institute these proceedings. He is not a creditor. In the case of *Wilson v. Baptist Ed. Society*, Justice BROWN, in his opinion (10 *Barb.* 308), says: "The word creditor means persons having claims that are recognized and admitted; or such as have been established by a competent court, and not those that have been disputed or rejected." A surrogate has no jurisdiction on the petition of a creditor to try the

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validity or merits of his claim when disputed by the executor. *Magee v. Vedder*, 6 *Barb.* 352; *Disosway v. Bank of Washington*, 24 *Id.* 60; *Andrews v. Wallege*, 17 *How. Pr.* 263; *Tucker v. Tucker*, 4 *Keyes*, 136. Under the Revised Statutes it was uniformly held that the surrogate had no power to adjudicate upon a claim rejected by the executor or administrator. He must await the ascertainment by judgment. *Tucker v. Tucker*, 4 *Keyes*, 136; *Riggs v. Cragg*, 89 *N. Y.* 491.

FINCH, J.—We must assume that the decree of the surrogate was reversed by the general term for ['] errors of law, since the order of reversal does not certify that it was based upon errors of fact. *Code of Civil Procedure*, § 1337; *Matter of Will of Cottrell*, 95 *N. Y.* 333. The errors of law alleged are two: First, that the petitioner's claim was disputed by the executor, and the surrogate had no jurisdiction to determine its validity; and, Second, that the claim was barred because no action upon it had been commenced within six months after its rejection.

['] It is undoubtedly the settled rule that a surrogate may not adjudicate upon a disputed claim as between the executor and the creditor upon an accounting. That rule, however, does not reach the case of a proceeding to mortgage, lease or sell the real estate, which becomes a contest between the heir or devisee and the creditor. That is regulated by statute, which seems to us to clearly confer the questioned jurisdiction. Its commands are so plain and forcible that the respondent here is compelled to admit that some disputed claims may be tried by the surrogate, and to limit his contention, barring the jurisdiction, to a case where it is the petitioner's demand which has been rejected. No such distinction is drawn or indicated in the statute.

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[³] The Code provides for a petition as the commencement of the proceeding and dictates by whom it may be presented. § 2750. The persons so entitled are the executor or administrator "or a creditor of the decedent other than the creditor by a judgment or mortgage which is a lien upon the decedent's real property." That specific class of creditors is alone excluded, and all others without limitation are permitted to institute the proceeding. The petition is required to state "the unpaid debts of the decedent and the name of each creditor or person claiming to be a creditor." § 2752. If the surrogate is satisfied, from the facts set forth, that a resort to the real estate is necessary for the payment of debts, it is made his duty to issue a citation to the heirs or devisees or persons claiming an interest in the property. § 2754. Upon the return of the citation the surrogate is authorized to hear the allegations and proofs of the parties. § 2755. A creditor of the decedent, although not named in the petition, "may present and prove his debt." The persons interested in the real estate "may contest the validity of the debt represented as existing against the decedent." The recovery of a judgment against the executor has no other effect than that of presumptive evidence of the debt, and the heirs or devisees may resist the validity of the claim as if no judgment had been rendered upon it. § 2756. But even if established, the costs of the judgment are to be excluded. The decree "must determine and specify the amount of each debt established before the surrogate as a valid and subsisting debt against the decedent's estate," and can only be made where, "after due examination," it has been "established to the satisfaction of the surrogate," among other things, "that the debts for the payment of which the decree is made are the debts of the decedent and are justly due." §§ 2758, 2759.

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These provisions were taken substantially from the Revised Statutes, and the compiler, in a note to section 2742, refers to "the anomaly" of a rule which on an accounting bars the trial of a disputed claim, but on a proceeding against the real estate permits it, and adds that the anomaly disappears when it is considered that in the latter case the surrogate "sits as a court of equity." Whether that explanation is altogether satisfactory need not be considered in view of the provisions of the statute, for they inevitably contemplate a determination of all claims upon the estate not already a lien. In what respect can there be the least utility in a judicial construction narrowing the language of the statute to creditors whose claims have been admitted by the executor or established in a court of law? In either event, the heir or devisee may dispute them, and the executor's admission does not affect the contestants or benefit the creditor, and the judgment even, merely raises a presumption which may be rebutted and so the whole question be thrown open. No authority for such a construction is furnished; for all of the cases cited by the respondents were cases on an accounting and between executor and creditor.

['] On the other hand, in *Hopkins v. Valkenburgh* (16 *Hun*, 3), and *Tucker v. Tucker* (4 *Keyes*, 136), the jurisdiction of a surrogate to try a disputed claim in the class of proceedings before us, was asserted directly or by clear implication. We are of the opinion that the general term erred in denying the jurisdiction of the surrogate.

The general term also erred in holding that six months' statute of limitation barred the plaintiff's ['] claim. Without adverting to other reasons, it is sufficient to say that before the amendment of 1882, it was held that the statute did not apply except to claims presented after commencement of publication by the executor of the notice to creditors (Whit-

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more *v. Foose*, 1 *Denio*, 159; *Tucker v. Tucker*, 4 *Keyes*, 136); that to obviate the rule thus established, the amendment of 1882 was adopted, inserting the words "either before" or so as to permit a presentation and effective rejection before publication (*Laws of 1882*, chap. 399); but by section 2 of the same chapter, this amendment is not to apply to cases in which letters had been issued before the adoption of the act; that the letters in this case were issued in 1879, and the presentation of the claim itself was before the amendment was adopted; and no notice to creditors was ever published by the executor.

These are the only errors of law relied on by the general term, and do not justify the reversal. Other alleged errors have been examined, but do not require discussion.

The order of the general term should be reversed, and the decree of the surrogate affirmed, with costs.

All concurred, except RAPALLO, J., absent.

CARNEY, RESPONDENT, *v.* WADHAMS, AS EXECUTOR, ETC., OF WILLIAM CARNEY, DECEASED, APPELLANT.

SUPREME COURT, FIFTH DEPARTMENT, GENERAL TERM, OCTOBER, 1885.

§ 829.

Evidence—Testimony as to conversation with deceased in action against executor.

The surviving party to a conversation cannot testify that any particular communication did or did not take place personally between himself and the deceased in a legal controversy between himself or

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one who derived his interest or title from, through or under him and the personal representative or survivor of the decedent.

Where, in an action brought by one "C." against the executors, etc. of his father, to recover for services performed by him upon a farm owned and occupied by the father, the defense was that such services as were rendered by "C.," were done as a member of the family and without any expectation on his part of receiving pay therefor, and "C.'s" sister, Mrs. Electa R. Nicolls, gave testimony tending to prove that "C." was a member of the family for purposes personal to himself, and at times against the wishes of his father, and also testified as follows: "I recollect once of hearing a conversation between father and Charles [the plaintiff], in 1876; they were in father's room; father asked him why he did not go home. I did not hear his reply; he didn't speak loud enough; father said he thought he ought to be at home;" and "C." was recalled by his counsel and was asked and answered in the negative, under objection, the following question: "Was there a time when Electa R. Nicolls was in the sittingroom and you were in the bed-room with your father, when he asked you why you didn't go home, or in substance that as testified to by Mrs. Nicolls?"—*Held*, that this question was improperly allowed; that the evidence related to a personal communication with the deceased, and was incompetent under section 829 of the Code of Civil Procedure; that the evidence contradicted by such improper testimony was material, and the admission of the incompetent evidence necessitated a reversal of the judgment.

Pinney v. Orth (2 *N. Y. Civ. Pro.* 1); *Holcomb v. Holcomb* (95 *N. Y.* 316), followed.

(*Decided October, 1885.*)

Appeal from a judgment entered upon the report of a referee, appointed by the surrogate of Niagara county, under the statute relative to disputed claims made against the estate of a deceased person.

Charles Carney, the claimant, is a son of the testator, and lived with the latter at his residence in Niagara county, from December, 1873, until May 28, 1877. The testator died in April, 1882. After letters testamentary were issued, the claim in dispute for services rendered during the period aforesaid was presented by

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the claimant to the executor, amounting in the aggregate to \$537.50, together with the claim of \$45, for money loaned and advanced. The referee found that the claimant entered into the service and employment of the deceased, under a contract that he should be paid a fair and reasonable value for his services, and in pursuance of the same was employed during the period mentioned, and that his services were worth \$150 per year, together with his board, lodging and washing, and allowed the entire claim, deducting therefrom alleged payments amounting to \$32. At the time the claimant went into the service of the deceased, as found by the referee, he was sixty-two years of age, and his father was eighty years old, and lived upon a farm of which he was the owner. The deceased had other children—one, a daughter, living with him during all the period mentioned.

The claim was resisted by the executor, upon the ground that such services as the claimant did render the deceased, in work and labor upon the farm, was done as a member of his family, and without any expectation upon his part to receive, or on the part of the deceased to pay for the same. In 1873, before the claimant went into the service of the deceased, he lived in Missouri, and owned a farm. His wife and family were left in charge of the same, during all the time the respondent was with his father, in Niagara county.

James F. Fitts, for defendant-appellant.

Burrell & Taylor, for plaintiff-respondent.

BARKER, J.—Upon the main question at issue, the evidence was contradictory. After giving the same a careful consideration, we are of the opinion, that it fairly tends to establish, that in December, 1873, an

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arrangement and understanding was entered into between the claimant and his father, by which the former was to remain with him, and take the care, management and superintendence of his farm, and to be paid for such service, a fair and reasonable compensation. Upon the issue the respondent held the affirmative, in view of the relation existing between the parties, to establish the fact, that the services which he did render, were to be paid for upon some basis, and were not rendered gratuitously, as the law presumes they were. We are unable to find any reason for interfering with the conclusions of the referee upon this question.

Before and during all the time the claimant lived with the deceased, Mrs. Nicolls, a daughter of the latter, lived with him and had charge of his domestic affairs: She was called as a witness by the executor, and gave evidence tending to prove that the claimant was at the home of his father as a visitor and member of the family, and that no contract was made between them for the payment to the claimant of any compensation for his services, except his board and lodging, and that his visit was for other purposes, personal to himself and at times against the wishes of his father. She gave this item of evidence: "I recollect once of hearing a conversation between father and Charles in 1876; they were in father's room, and I was in the sitting-room; father asked him why he did not go home; I did not hear his reply; he didn't speak loud enough; father said he thought he ought to be at home; I never knew of any contract between Charles and father for work; I never knew of father's paying Charles any money; I usually received the money for the produce of the farm and paid it out as father directed."

Thereupon the plaintiff himself was recalled as a witness and this question was asked him by his coun-

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sel: "Was there a time when Electa R. Nicolls was in the sitting-room and you were in the bed-room with your father, when he asked you why you didn't go home or in substance that, as testified to by Mrs. Nicolls?"

This question was objected to on the part of the appellant, on the ground that the witness was called in his own behalf, and could not testify to any conversation between himself and the deceased, or contradict any sworn proof by other parties not in interest, which was overruled and the appellant excepted, and the witness answered the question in the negative. On his cross-examination, the following question was asked him by the appellant's counsel: "How do you know that Electa R. Nicolls was not in the sitting-room at the time this conversation was alleged to have taken place between your father and you in the bed-room?" and the witness answered: "Because I never had such a conversation with him."

It is claimed by the appellant, that the exception to the reception of the answer to the first question was well taken as the evidence brought out by the same was incompetent under section 829 of the Code. If the answer to the question is in substance and effect, a denial by the witness, that there was a conversation between himself and the deceased of the nature testified to by Mrs. Nicolls, then the exception to the evidence was well taken as testimony of this character is prohibited by section 829, as the same is construed in *Pinney v. Orth* (2 *N. Y. Civ. Bro.* 1); *Holcomb v. Holcomb* (95 *N. Y.* 316). In each of these cases the rule is laid down, that the surviving party to a conversation is prohibited from testifying that any particular communication did or did not take place personally between himself and the deceased, in a legal controversy between the parties mentioned in the statute.

The respondent in support of the ruling of the

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referee, contends that the question and answer when read together, is in effect and nothing more than a statement by the witness that there was no interview between himself and the deceased at the time and place mentioned by Mrs. Nicolls. If such is the nature and substance of the evidence, then it was entirely competent, and its reception was not condemned by the rule of evidence as laid down in the statute (*Lewis v. Merritt*, 98 *N. Y.* 206; *Pinney v. Orth*, 2 *N. Y. Civ. Pro.* 1).

The manifest purpose of the question was to call from the witness an admission or a denial that there was or was not, a conversation between the witness and the deceased, as testified to by Mrs. Nicolls. The form of the question admitted of an answer from the witness in the affirmative or negative without qualification or explanation. The negative answer which he did give was a full and complete denial that there was any such conversation as related by Mrs. Nicolls. The answer would have been strictly true, if there was no such conversation, although it might have been true that the witness was in the bed-room in conversation with the deceased, on some other subject and Mrs. Nicolls at the same time in the sitting-room, where she could hear the conversation, as stated by her in her evidence. It is evident that the appellant understood from the form of the question, that the inquiry embraced therein, related to the nature and character of some interview, which did in fact take place between the witness and the deceased, and this is plainly indicated by the form of the objection interposed. The respondent did not, in response to the objection, declare the object and purpose of the question. He, by his silence, tacitly admitted the purpose and object of the inquiry to be as the appellant supposed it was as indicated by the form of the objection. For the purpose of escaping the force of the exception

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he ought not on this appeal to be allowed to change his position. The witness himself gave his own understanding and meaning of the question by his answer to the question propounded on the cross examination. That question was framed on the supposition that the witness was in the bed-room with the deceased, at the time mentioned by Mrs. Nicolls, and in his answer he gave as a reason why he knew that Mrs. Nicolls was not in the sitting-room at the time stated by her, because there never was any such conversation between himself and his father as she related in her evidence.

We are of the opinion, that error was committed in allowing the claimant, as a witness in his own behalf, to testify that his father did not make the request of him to return to his home, as testified to by Mrs. Nicolls.

The claimant's counsel contends that although the referee may have erred in receiving the evidence, the error was immaterial, because there was no probative force in that part of the evidence given by Mrs. Nicolls, which the claimant was permitted to deny. His position is untenable, for the evidence bore directly upon the question whether there was any arrangement existing between the parties by the terms of which, the respondent was to be compensated for his work and labor. The only evidence in support of the claimant's contention, that there was a contract for compensation was given by himself and his son, and much of the evidence bearing on this question as given by the claimant himself, would have been excluded as incompetent, if a proper and timely objection had been made by the testator's counsel, for the reason that it would have been in violation of the provisions of section 829. We cannot say that the referee was not influenced by the denial made by the claimant, and relying upon it as true, discredited the evidence of Mrs. Nicolls on this and other questions.

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But a small portion of the services rendered by the claimant for which compensation was allowed by the referee were performed within six years prior to the death of the testator. The statute of limitations would be a bar to recovery for some of the time of service allowed by the referee, had no payments been made to take that part of the service out of the operation of the statute (*Davis v. Gorton*, 16 *N. Y.* 255).

The claimant sought to prove payments to save that portion of his claim from being outlawed and gave some evidence which we regard as slight, in support of such payment. The appellant insists that the referee's finding that a payment of \$20, was made on and towards the services, is against the weight of evidence. As there must be a new trial, for the error already pointed out, we do not consider this question, for upon another trial, if one is had, the evidence as to payments, may not be precisely of the same force and effect, as that now before us.

Judgment reversed and new trial granted. Costs of this appeal to abide final determination of the question of costs.

SMITH and BRADLEY, JJ. concurred.

Farmers' Nat. Bank of Rome v. Williams.

THE FARMERS' NATIONAL BANK OF ROME
v. WILLIAMS, IMPLEADED, ETC.

SUPREME COURT, FOURTH DEPARTMENT, ONEIDA
COUNTY, SPECIAL TERM, APRIL, 1886.

§§ 451, 721.

Name—Defendant sued by name in which he signed note—Amending summons and complaint after default in answering by inserting defendant's true name.

Where a person was sued as "W. H. Williams," on a note signed by him in that name, and after his time to answer had expired, the summons and complaint were, by order of the court, amended by inserting the word "William" in place of the letter "W." in the title of the action, and judgment was entered by default against "William H. Williams," who was concededly the person named in the summons and complaint served as "W. H. Williams,"—*Held*, that a motion to set aside the order and judgment on the ground that the court had not acquired jurisdiction over "William H. Williams," should be denied; that the defect was a mere irregularity by which the defendant was not prejudiced.

(Decided April 17, 1886.)

Motion to set aside order amending summons and complaint, and judgment entered against the defendant by default.

The opinion states the facts.

W. L. Goodier, for defendant and motion.

E. L. Stevens, for plaintiff, opposed.

MERWIN, J.—The summons and complaint in this action were served on the defendant Williams on Jan-

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nary 22, 1886. He was named therein as "W. H. Williams." He did not appear in the action, and on March 25, 1886, the plaintiff obtained an *ex parte* order from court, amending the summons and complaint by inserting the word "William" in the place of the letter "W." in the title of the action, and on March 26, 1886, the plaintiff entered judgment, in which the defendant Williams is named "William H. Williams," and issued execution. Motion is now made to set aside the order and judgment on the ground that the court had no jurisdiction over the said William H. Williams to make the said order, or render the said judgment.

Concededly "W. H. Williams" and "William H. Williams" are the same person. The action is on a note, a copy of which is set out in the complaint, and was made by Williams, and indorsed by the other defendants. The signature to the note is "W. H. Williams."

In *Grant v. Birdsall* (2 *N. Y. Civ. Pro.* 422), a defect, similar to the one in question, is said to be a mere irregularity, which the court should disregard as not affecting a substantial right.

It seems to have been held, that where a man enters into a contract, or does any act in a particular name, he may be sued by the name that he used, whatever his true name may be (DALY, C. J., in *Petition of John Snook*, 2 *Hill*. 566).

A single letter may constitute the first name of an individual (*Tweedy v. Jarvis*, 27 *Conn.* 42; and see *Abb. Annual Digest*, for 1884, 232).

In the present case the right party was served, he has not been prejudiced by the mistake, and he has no defense to the action. He was sued by the name which he used in signing the note. It seems to me he has no right to now complain. I am inclined to think the judgment would have been good against him in the

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form in which he was sued, and if so, then he has not been injured by the amendment.

Motion denied, with costs of motion.

CARTER, APPELLANT, v. DE CAMP, ET AL.,
RESPONDENTS.

SUPREME COURT, FOURTH DEPARTMENT, GENERAL
TERM, APRIL, 1886.

§§ 484, 488, 490.

Demurrer—Must specify objections—Joinder of legal and equitable causes of action—Appeal from interlocutory judgment.

A demurrer to a complaint must distinctly specify the objections to it, and the court in considering a demurrer is confined to the grounds therein specified, and cannot sustain it upon unspecified demurrable defects appearing upon the face of the complaint.

The fact that an equitable cause of action triable by the court, and a legal cause of action triable before a jury, are united in the same complaint, is not a ground for demurring.

An appeal lies to the general term of the supreme court from an interlocutory judgment of the special term of that court, sustaining or overruling a demurrer, and granting the defeated party leave to plead anew within twenty days, upon paying costs.

Where an interlocutory judgment is reversed on appeal, the final judgment entered on it falls with it.

Where, after an appeal had been taken from an interlocutory judgment sustaining a demurrer to the complaint, with leave to the plaintiff to plead over, the time to so plead expired without the plaintiff's having done so, and final judgment was entered on proof of those facts, from which the plaintiff appealed, claiming that the judgment was irregularly entered, and it did not appear that the proceedings were stayed pending the appeal from the interlocutory judgment, nor that a motion to vacate the final judgment had been

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made,—*Held*, that the plaintiff erred in his practice in appealing from the final judgment.

(*Decided April, 1886.*)

Appeal by plaintiff from an interlocutory judgment sustaining defendant's demurrer to the complaint, and from a final judgment entered on plaintiff's failure to plead over.

The complaint contained two counts. The first of which set out that the plaintiff was the owner of certain lands lying on both sides of Otter creek, and along the same for the distance of two miles or more ; that said creek is a stream in the county of Lewis, emptying into the Black river ; that the plaintiff was, during the time mentioned in the complaint, the owner of a saw-mill located upon said lands, which was supplied by water for power from a pond formed by a dam built by plaintiff across the creek, near said mill ; that about two miles above said mill the plaintiff had built another dam, called the "hill dam," upon his own land, across said creek, from which he drew water for the supply of said mill, from time to time, as necessity required ; that the storage of water by means of said "hill dam" was absolutely essential to the proper running of the plaintiff's saw-mill ; that the plaintiff cut logs from his land for the purpose of sawing the same into lumber, at his said mill, and floated the same down said creek into his pond, and from there they were taken to the saw-mill to be sawed ; that on May 14, 1885, the plaintiff had several hundred thousand feet of logs in his said pond, and in said creek, with intent to saw them into lumber at his said mill ; that the defendants, during the time mentioned in the complaint, were the joint owners of lands on both sides of said creek, above the lands of the plaintiff, from which they were engaged in cutting saw logs

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and dumping them into said creek, floating them down the same, through the plaintiff's ponds, to the mouth of the said creek, and thence into the Black river; that for the purpose of affording them sufficient storage water to enable them to float their logs from said hill dam down to plaintiff's said saw-mill dam, the defendants at divers times shut down the gates at the hill dam, without the authority or consent of the plaintiff; that in consequence thereof the plaintiff had at divers times been hindered and delayed in running his said saw-mill, by reason of a lack of sufficient water supply to run his saw-mill, causing his said mill to be run on less than full time, on divers days since said May 14, 1885; that when the defendants began driving their logs down the stream, it was agreed between them and the plaintiff that when their logs were about all sluiced through, they would leave behind at the plaintiff's saw-mill dam, a quantity of logs equal in quantity and quality, with those of plaintiff's logs that should become intermingled and driven along with the defendant's logs; that about three hundred thousand feet of hemlock logs, about one hundred and thirty thousand feet of spruce logs, about three hundred feet of cherry logs, and about ten thousand feet of pine logs had been intermingled with the defendants and driven down the stream, and thereby lost to the plaintiff; and the defendants had notified the plaintiff that they would not be responsible in any way, nor account for any of plaintiff's logs which should pass plaintiff's saw-mill in their drive; that it was estimated that about five hundred thousand feet of logs belonging to the plaintiff were in danger of becoming intermingled with the defendants' logs and driven down the stream, if the defendants continued driving logs down as they theretofore had done, and the plaintiff's saw-mill would necessarily become idle and entirely useless to the plaintiff, who

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would thereby lose the profit derived from cutting the logs into lumber and laths, and about twenty-five men in plaintiff's employ would be thrown out of work for the balance of the season, and that by reason of the premises the plaintiff had been damaged in the sum of \$4,000. The second count of the complaint alleges "for a further and second cause of action," that on and after May 14, 1885, the defendants "willfully, maliciously, and unlawfully, without plaintiff's authority, permission, or consent, cause to be driven" past plaintiff's saw-mill, and beyond his recovery, 440,300 feet of logs belonging to the plaintiff, which he had at that time in, along, and on Otter creek, and at and above his saw-mill and dam; that the value of said logs was \$2,300, no part of which sum had been paid or offered to the plaintiff by the defendants, who had notified the plaintiff that they would not pay for said logs.

The demand for judgment was "(1st) that the defendants and each of them, their and each of their agents, servants and employes, be forever restrained from entering on plaintiff's land at said 'hill dam,' and from shutting or opening the gates of said 'hill dam,' and from floating logs over same except by the means afforded by plaintiff; and from further driving their logs down said Otter creek in such manner as to drive plaintiff's logs past said saw-mill, as they are now doing; and from cutting said 'boom' at the mouth of said Otter creek until plaintiff's damages are fully ascertained and paid; (2d) that defendants be adjudged, upon a proper and legal accounting and appraisal thereof, to pay to the plaintiff compensation for the injury already sustained by him in the premises; (3d) for the market value of the said four hundred and forty thousand three hundred feet of logs, with interest from the commencement of this action; and (4th) for the costs of this action."

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The defendants served a demurrer to this complaint which, omitting title and signature, read as follows :

“The defendants demur to the plaintiff’s complaint herein, on the ground that two causes of action have been improperly united therein.

“The particular defect relied upon by the defendants is that the first cause of action is for equitable relief by injunction for injuries to real estate, and such cause of action is triable by the court, but the second cause of action is for the recovery of the value of personal property alleged to have been converted by defendants, and such cause of action is triable by jury ; and such two causes of action cannot be joined and tried together, without great prejudice to the defendants, and a sacrifice of their rights.

“And defendants demand such judgment or relief as they may be entitled to under section 497 of the Code of Civil Procedure.”

The court at special term in Lewis county sustained the demurrer, and an appeal was thereupon taken from the interlocutory judgment.

Other facts are stated in the opinion.

Gurdon G. Shrauder, for plaintiff-appellant.

The appeal from the interlocutory judgment was proper and not premature (*Code of Civil Procedure*, § 1349). . . . If the first cause of action be held to be (for equitable relief by injunction) for injuries to real estate, and the second cause of action for the recovery of personal property (converted by the defendants), they are properly joined in the complaint, under section 484 of the Code of Civil Procedure. Because the one cause of action is triable by the court, and the other by jury, is no ground for demurrer. *Polley v. Wilkisson*, 5 *N. Y. Civ. Pro.* 135 ; *Sternberger v. McGovern*, 56 *N. Y.* 12, 20, 21 ; *Rank v. Levinus*, 5 *N. Y. Civ. Pro.* 368, 370, 371 ; *N.*

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Y. Ice Co. v. N. W. Ins. Co., 21 *How.* 296 ; S. C., 23 *N. Y.* 357 ; Lattin v. McCarty, 41 *N. Y.* 107 ; Laub v. Buckmiller, 17 *Id.* 620 ; Phillips v. Gorham, 17 *Id.* 270 ; Bidwell v. Astor Mut. Ins. Co., 16 *Id.* 263, 267 ; Dobson v. Pearce, 12 *Id.* 156 ; Reuben v. Joel, 13 *Id.* 488 ; Getty v. Hudson River R. R. Co., 6 *How. Pr.* 269. . . . The court at special term erred in not confining itself to the demurrer, and the grounds therein stated. . . . Defendants relied solely upon their allegations that the first cause of action, being for equitable relief by injunction for injuries to real estate, and triable by the court, and the second cause of action being for the recovery of the value of personal property, etc., and triable by jury ; such two causes of action could not be joined and tried together without great prejudice to the defendants, and a sacrifice of their rights. The sole objection of defendants appears to be that the two causes of action could not be joined because different modes of trial might be required. On this ground no demurrer could lie (*Sternberger v. McGovern*, 56 *N. Y.* 12, 20 ; *Lattin v. McCarty*, 41 *Id.* 107), and the trial judge having substantially so held, erred in his final conclusion, by sustaining the demurrer on grounds not alleged.

C. D. Adams, for defendants-respondents.

Cited in support of contention that an appeal did not lie from the interlocutory judgment. *Cambridge Valley Natl. Bank v. Lynch*, 76 *N. Y.* 514 ; *Victory v. Blood*, 93 *Id.* 650 ; *Trust & Deposit Co. v. Pratt*, 25 *Hun*, 23 ; *Smith v. Rathbun*, 88 *N. Y.* 660 ; *Walker v. Spencer*, 86 *Id.* 162.

FOLLETT, J.—“The demurrer must distinctly specify the objections to the complaint” (*Code of Civil Procedure*, § 490). In considering a demurrer, the court is confined to the grounds specified in it.

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and a demurrer cannot be sustained upon unspecified demurrable defects appearing upon the face of the complaint (*Berney v. Drexel*, 33 *Hun*, 419; *Nellis v. De Forest*, 16 *Barb.* 61, 65; 2 *Wail's Pr.* 454; *Boone's Code Pldg.* § 44). In *Nellis v. De Forest* (*supra*), it was held that a demurrer on the ground that the facts stated are insufficient to constitute a cause of action for certain specified reasons, excludes from consideration all other grounds of demurrer arising out of the insufficiency of the facts pleaded. The sole defect in the complaint specified in the demurrer is, that an equitable cause of action, triable by the court, and a legal cause of action, triable before a jury, are united, which is not a ground for demurring (*Code of Civil Procedure*, § 484; *Bradley v. Aldrich*, 40 *N. Y.* 504-512; *Lattin v. McCarty*, 41 *Id.* 107; *Sternberger v. McGovern*, 56 *Id.* 12). The special term sustained the demurrer, upon the ground that a cause of action for an injury to real estate, and a cause of action for conversion of personal property cannot be united, though both causes of action arise out of the same transaction. Assuming this to be a demurrable defect, which is not considered (*Colton v. Jones*, 7 *Robt.* 164; *Polly v. Wilkisson*, 5 *N. Y. Civ. Pro.* 135), it was not raised by this demurrer.

The demurrer might as well have been sustained upon the unspecified ground, that inconsistent causes of action are united. The first count alleging a cause of action arising upon defendants' breach of contract, to leave as many, and as valuable logs as they floated away prior to May 25; and the second count alleging a cause of action for converting the same logs, and other logs, floated away after May 25.

The interlocutory judgment sustaining the demurrer, and granting plaintiff leave to plead anew within twenty days, upon paying costs, was entered November 11, 1885, and the plaintiff appealed there-

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from November 30, 1885. An interlocutory judgment, sustaining or overruling a demurrer, is appealable to the general term (*Code of Civil Procedure*, § 1349; *Cambridge Valley Nat'l Bank v. Lynch*, 76 *N. Y.* 514). December 24, 1885, defendants filed with the clerk an affidavit stating that more than twenty days had elapsed since the entry and service of the interlocutory judgment, and that the plaintiff had not paid costs; and thereupon a final judgment was entered, dismissing the complaint, with costs, from which the plaintiff also appeals, claiming that it was irregularly entered. The record does not disclose whether the defendants' proceedings were stayed pending the appeal from the interlocutory judgment, nor that a motion to vacate the final judgment for irregularity has been made. But the question is of no moment, as the final judgment falls with the interlocutory judgment, which is reversed, and as both parties have slipped in their practice, without costs to either party.*

HARDIN, P. J., and BOARDMAN, J., concurred.

* The court granted leave to the defendant to answer the complaint in twenty days.

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DONOVAN, RESPONDENT, v. CONNELL, APPELLANT.

N. Y. COURT OF COMMON PLEAS, GENERAL TERM, MAY, 1886.

§§ 550, Subd. 3, 3191.

Order of arrest—When court of common pleas will review order denying motion to vacate, on appeal from N. Y. city court—Fiduciary capacity—When factor not acting in.

Where, in an action against a commission merchant for the price of certain merchandise consigned to him by the plaintiff for sale, which he had sold, and for which he had received payment, it appeared the consignment was made, and dealings between the parties had, in accordance with a general custom of the trade that the factor should mingle the proceeds of the sale whenever made indiscriminately with his own funds and pay by his check on Saturday for all merchandise delivered during the week, whether the same was sold or unsold,—*Held*, that the relation between the parties was not a fiduciary one within the meaning of subdivision 3 of section 550 of the Code of Civil Procedure providing for the arrest of the defendant in an action for money received in a fiduciary capacity; also *Held*, that the case was one in which the N. Y. court of common pleas could review an order of the city court of New York denying a motion to vacate the order of arrest.

Morris v. Talcott (96 N. Y. 100), followed.

(Decided May 3, 1886.)

Appeal from order of general term of the city court of New York affirming order of the special term of that court denying motion to vacate order of arrest.

The action was brought to recover the value of certain sheep and lambs alleged to have been delivered by the plaintiff to the defendant to be sold on commission. The complaint averred that said sheep and lambs were sold by the defendant for the sum of \$724.35 which he had received therefor, and which

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sum, less \$35.40, the amount of defendant's commissions, the plaintiff had demanded from him, and that he had refused to pay the same or any part thereof to the plaintiff, and had "converted it to his own use." The order of arrest was granted on the complaint and an affidavit containing substantially the same statements. The order of arrest stated that the ground of arrest was "the wrongful conversion of money received in a fiduciary capacity."

The defendant's answer, among other things, alleged that the sheep and lambs were received by the defendant, to be sold on commission, and "that the manner and terms of sale by defendant and his mode of settlement," constituted no part of the conversation resulting in the agreement under which the consignment was made "that being determined by a usage or custom between commission merchants dealing in defendant's line of business . . . pursuant to which said agreement was made; that under and by virtue of said usage or custom, a commission merchant accounted to his consignee every Saturday, giving him his individual check for the amount of the sales, less his commissions, irrespective of his having realized the proceeds of such sales, such commission merchant dating such checks ahead for his own accommodation."

The motion to vacate the order of arrest was made on the pleadings, and on affidavits submitted by the defendant confirming the allegation of his answer, and on counter-affidavits on the part of plaintiff.

The motion was denied at special term, and the order denying it affirmed at general term (see opinions reported 8 *N. Y. Civ. Pro.* 289, 292, *note*), but reversed by the general term of the New York court of common pleas (see report of decision, 8 *N. Y. Civ. Pro.* 283), and remitted to the special term of the city court, to be heard upon the merits. On the second

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hearing the motion was again denied at special term (per HYATT, J.), and its order affirmed by the general term, which filed the following opinion.

PER CURIAM.—(MCADAM, Ch. J., HALL, J.)—The plaintiff consigned to the defendant certain goods to be sold on commission. The goods were sold, but the proceeds of the sale, which were received by the defendant in a fiduciary capacity, have never been accounted for. For this failure to pay over the defendant is liable to arrest (See cases collected in Moore v. Hillabrand, *Daily Register*, Dec. 1, 1885). We think the motion was properly disposed of at special term, and that the order appealed from must be affirmed on the merits with costs.

Horace Secor, Jr. (*John T. Cornell*, attorney), for defendant-appellant.

Joseph C. Wolff, for plaintiff-respondent.

LARREMORE, Ch. J.—When this case was before the general term of this court before, it was held that the papers used on the application for the order of arrest did not disclose a cause of action for conversion. It was also held that the city court, at special and general term, erred in deciding to allow a jury to pass upon the question whether a fiduciary relation or one of mere debtor and creditor existed between the parties, and such question was remitted to the city court, to be decided by a judge thereof at special term (8 *N. Y. Civ. Pro.* 283). The special term of the city court, after hearing the application on the merits, has again refused to vacate the order of arrest; its order was affirmed by the general term of that tribunal, and from such order of affirmance this appeal is taken. The question, how far we are bound by the allegations

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of the complaint as to the theory of the action having been determined on the former appeal, and it having been then decided that a cause of action for conversion is not therein set forth, and that the causes of arrest, if any, are extrinsic to and not identical with the cause of the action, it seems clear that this order must be reversed.

Defendant alleges a general custom of the trade of which the plaintiff was aware, and in which he had acquiesced in all dealings between the parties for many years. The factor mingled the proceeds of the sale, whenever made, indiscriminately with his own funds, and paid by his check on Saturday for all merchandise delivered during the week, whether the same was then sold or unsold. Plaintiff does not deny the existence of the usage or that his dealings were had in accordance with it. Indeed, he expressly admits some of the more important facts averred. The relation of the parties was not, therefore, a fiduciary one within the meaning of subdivision 3 of section 550, Code of Civil Procedure, but an ordinary one of debtor and creditor (*Wallace v. Castle*, 14 *Hun*, 106; *Duguid v. Edwards*, 50 *Barb.* 300; *Grover & Baker Sewing M. Co. v. Clinton*, 5 *Bissell* [U. S. Circ. Ct.] 324; *Alliance Ins. Co. v. Cleveland*, 14 *How. Pr.* 408). According to facts alleged in defendant's answer and affidavit, and which are not denied, we think the present case comes within the principal laid down by the court of appeals in *Morris v. Talcott* (96 *N. Y.* 100),* and that the order appealed from should be reversed, with costs.

DALY and VAN HOESSEN, JJ., concurred.

* The principal referred to is stated in the opinion in *Morris v. Talcott*, as follows (per RUGER, Ch. J., delivering the opinion of the court).

"Upon an appeal from an order denying a motion to vacate an order of arrest, obtained upon the theory of a fraudulent contraction

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ROCHESTER, AS RECEIVER, &c. v. THE MAYOR,
ALDERMEN, AND COMMONALTY OF THE
CITY OF NEW YORK, ET AL.SUPREME COURT, FIRST DEPARTMENT, NEW YORK
COUNTY, SPECIAL TERM, JANUARY, 1886.

§§ 968, 969, 1013.

Equitable action—When not referred—When should be tried by court.

Where, in an action brought to set aside certain releases, and the satisfaction of a judgment recovered in an action alleged to have been brought in the name of one B., for the benefit of the plaintiff, the defendant moved for a reference of the issues,—*Held*, that the action was an equitable one triable by the court, that the question whether or not it should be referred was addressed to the discretion of the court; that if it involved a difficult question of law it must be tried by the court, and if not, it should be so tried unless it appeared that the court was overburdened with business and could not try the case within a reasonable time or without a delay, which would seriously injure the rights of the parties or of one of them.

It seems, that if a trial will involve difficult questions of law, the action should not be referred even though it requires the examination of a long account.

Instance of an action which did not involve the examination of a long account.

(*Decided January 20, 1886.*)

of debt, this court (*i. e.*, the court of appeals) will not review the order when the facts and circumstances proved, or the legitimate inference deducible from such facts, furnish some evidence tending to establish the existence of a fraudulent intent on part of the defendant in the creation of the debt (*Wright v. Brown*, 67 *N. Y.* 1). But when there is no evidence legitimately tending to establish such a conclusion, and the natural inferences to be drawn from the facts stated do not necessarily lead to the presumption of a fraudulent intent, a question of law is presented which calls for the judgment of this court."

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Motion by plaintiff that a referee be appointed to try the issues in this action.

The facts are fully stated in the opinion.

Oliver W. West, for plaintiff and motion.

Thomas P. Wickes (*E. Henry Lacombe*, counsel to the corporation), for the defendants, The Mayor, &c., opposed.

POTTER, J.—This is a motion upon the part of the plaintiff, for the appointment of a referee to try the issues in this action.

The effect of the allegations of the complaint, and the relief sought, are essentially of an equitable character.

Those allegations are briefly but substantially these : that in the year 1865, under the authority of the acts of the legislature for that purpose, the defendant, through certain of its officers, entered into a contract with John L. Brown, William H. Devoe and Shepherd F. Knapp, for the cleaning of streets of said city, for the period of ten years ; that annually from the time of making said contract the legislature appropriated sums of money to pay for work in cleaning the streets of the city beyond what was required under said contract ; that some time in 1869 the said Brown, by assignment of the interest of said Devoe & Knapp, became the sole contractor for cleaning the streets for said city, and with its assent ; that in the last named year the said Brown and others formed an association under the laws of the State, for the cleaning of streets of said city, under the name of "The New York Street Cleaning Association," and the said Brown thereupon transferred to said association his plant and property for cleaning said streets, and thereafter the work of clean-

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ing said streets was done by said association, and with the knowledge and assent of the said city until June, 1872, and that during the last mentioned period the said association did all the work of street cleaning for said city, and received payment therefor except the sum of \$86,000, which accrued between July 1, 1871, and October 2, 1871; that on October 23, 1871, the bill for said \$86,000 was audited and allowed by the street cleaning commissioners, and the same agreed upon, but the defendant omitted to pay the same; that in 1873 the said Brown commenced an action in his own name to recover said sum, and an answer was put in by the defendants and the issue was referred; that during the pendency of the action said Brown died, and his personal representatives were substituted; and that upon the revocation of their letters or appointments, William A. Server was appointed special administrator, and the action was thereupon continued in the name of the special administrator; that a judgment was rendered in said action for the amount of said claim and interest; that the defendant appealed to the general term from said judgment, and pending the appeal from said judgment the same was settled and compromised, and a satisfaction thereof signed by said administrator, was entered of record, and the defendants were also released from any claim by reason of said judgment, and the matter therein contained by said administrator, and by Hannah E. Brown and John L. Brown, Jr., individually, and as executors, and that subsequently the said Hannah and John were again appointed executors of said Brown, deceased, and were again substituted as plaintiffs in said action; that there has been no order discontinuing said action; that said settlement and payment were fraudulent and void as to the said association, and that the plaintiffs ask as appropriate relief in this action that said satisfaction-piece and the cancellation and satisfaction of

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said judgment by the clerk, &c., be set aside, and the said judgment be restored and declared in full force and validity, and that said release be also adjudged fraudulent and void and be set aside, and that said claim and the judgment thereupon be declared to belong to said association, and the said defendant adjudged and directed to pay said judgment to the plaintiff as receiver of said association.

It is plain from this statement that there is no occasion for the examination of a long, or of any account, for the claim has been once voluntarily liquidated by the parties to the contract, and subsequently determined by the judgment; and that plaintiff in this action simply seeks to restore said judgment and to be authorized and permitted to enforce it for the benefit of the association. It is not perceived how the examination of a long account can be involved in the trial of the present action. The question would seem to be simply this, whether that judgment was legally paid or satisfied by the satisfaction-piece and releases.

The plaintiff assumes and asserts that the action in which the judgment was rendered was brought in the name of Brown, but for the benefit of the association as the party in interest, and claims to be the owner of the judgment, and as such, the only party who was authorized to receive payment of it or to compromise it. If the plaintiff is sustained in this respect the judgment was not legally settled, and the plaintiff is entitled to have the judgment restored subject, perhaps, to the right of prosecuting the appeal by the defendant.

If the plaintiff does not sustain his right to the judgment, then the judgment was legally settled and plaintiff must be bound by that settlement.

In either aspect the amount of the claim (if it had not been agreed upon as alleged in the complaint) is fixed by the judgment, and there cannot be any neces-

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sity or occasion in this action to investigate the items of the claim.

If the plaintiff, as receiver of this association, had brought this action to recover the claim upon the theory that the action by Brown as an individual was in fraud of the rights of the association, and was fraudulently carried on to judgment, and then fraudulently and collusively settled by the defendants, and Brown's personal representatives, then the trial would or might involve the items of the claim. But this action is not brought upon any such theory.

It is simply an action in equity to set aside the unauthorized satisfaction and discharge of a judgment which belonged to the association, and not John L. Brown, individually.

This action is properly an action triable by the court and not by a jury as a matter of right (*Code of Civil Procedure*, §§ 968, 969, 1013). Application is made by plaintiff to refer it, and the defendant resists such application.

Under section 1013, whether to refer or to refuse the reference, is addressed to the discretion of the court.

It is obviously the purpose and theory of the law that equity actions are to be tried by the court.

Even in actions involving the examination of a long account, references are ordered, not as a matter of right or of favor to the parties, but for the convenience of the court, and the court cannot, for its own convenience in such cases, order a reference where there are difficult questions of law involved (*Goodyear v. Brooks*, 2 Abb. Pr. N. S. 296).

It is urged by the defendant in opposition to the application to refer this action that its trial will involve the decision of difficult questions of law. If so, it should not be referred, though its trial should involve the examination of a long account.

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Actions involving difficult questions of law must be tried by the court. It is true that the plaintiff urges that the case involves no difficult questions of law. If he is correct in this and that all the questions at law are of easy solution, it should nevertheless be tried by the court, unless the courts are overburdened with business and cannot try the case within a reasonable time or without a delay which would seriously injure the rights of the parties or one of them.

Nothing of that sort is shown by the papers upon the motion, nor is pretended. Indeed, I am informed that a reasonable speedy trial of the case may now be had at special term. There is nothing shown upon this motion to cause the court to depart from the theory of the law as provided in section 969, and the numerous cases holding that actions to set aside fraudulent conveyances, transfers, releases and settlements should be tried by the court (*Draper v. Day*, 11 *How. Pr.* 439; *Bushnell v. Eastman*, 2 *Abb. Pr. N. S.* 411).

The motion must be denied.

ESTATE OF PHILIP ARBOGAST, DECEASED.

SURROGATE'S COURT, NEW YORK COUNTY, APRIL,
1886.

§ 2715.

Appraisal.—When executor cannot be required to amend or file further inventory.—When correctness of cannot be tried.

Where an order was made upon the application of the administrators of a decedent's estate, directing an appraisal of such assets left by the decedent as had come to their knowledge, and certain of the next of kin moved that the administrators be required to produce an appraisal of all the papers of said deceased, of any nature what-

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ever, and especially any list of personal estate which the decedent may have left in his safe, and any paid up checks returned to deceased by his bank of deposit or any check book, in order that the appraisers may, by examining the same, determine the amount of the assets of the estate and the amount of advancement made by the deceased and to his children and children-in-law; and the administrators expressly declare that they have already submitted to the appraisers a true and full inventory and statement of all assets, money, mortgages, stocks, bonds, claims and demands belonging to the estate,—*Held*, that the motion should be denied;[¹] that the correctness of the inventory could not be tried or falsified in a proceeding for that purpose;[³, ⁵] but all disputed questions respecting the existence of assets or their valuation should be postponed until the period of accounting, when it would be competent for the parties in interest to prove that he had not charged himself with all the property that had reached his hands or should have reached his hands, or with the true value thereof.[³, ⁵]

It seems, that it is only where the allegations of an applicant for a new or amended inventory of the estate of a decedent are admitted or not denied by the administrator that the surrogate will order the filing of another or amended inventory.[⁴]

Section 2715 of the Code of Civil Procedure, so far as it concerns the ordering of a further inventory of a decedent's estate, where one has already been made by the executor or administrator, is a mere consolidation of certain repealed provisions of title 3, chapter VI., part 2 of the Revised Statutes, and has not in any manner enlarged the responsibilities of executors and administrators, or the rights and privileges of creditors, legatees or next of kin, as regards the making of inventories.[²]

Thomson v. Thomson (1 *Bradf.* 24), followed.[⁴]
(*Decided April 23, 1886.*)

Motion by legatees that the administrators be required to produce on the appraisal of their decedent's estate certain papers.

The opinion states the facts.

ROLLINS, S.—Upon the application of the administrators of this estate the surrogate lately made an order directing an appraisal of such assets left by the

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decedent as had come to the knowledge of the applicants. A motion is now made on behalf of certain of the next of kin for an order directing the administrators "to produce on the appraisal all the papers of said deceased of any nature whatever, and especially any list of personal estate which the decedent may have left in his safe, and any paid up checks returned to deceased by his bank of deposit, or any check books, in order that the appraisers may, by examining the same, determine the amount of the assets of the estate and the amount of advancements made by the deceased to his children and children-in-law." The various allegations contained in the papers presented by the moving parties in support of their application are denied in the answering affidavits submitted by the respondents. The administrators expressly declare that they have already submitted to the appraisers a true and full inventory and statement of all assets, money, mortgages, stocks, bonds, claims and demands belonging to the estate.

Under these circumstances I must decline to ['] grant the order prayed for. It is not contended by the applicants for that order that there is any express provision of statute which requires or authorizes the surrogate to make it. The written laws which regulate the proceedings for the preparation and return of inventories do not seem to contemplate any interference by legatees or next of kin with the action which executors and administrators, aided by appraisers, are required to take.

The representative of the estate must act upon his own responsibility and under the sanction, not only of his official oath, but of a special oath which he is required by law to take in verification of the accuracy of his inventory. It is manifest that the granting of this motion would be of no legitimate practical advantage to the applicants unless it would enable them to

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try issues with the respondents respecting the correctness of such inventory as may hereafter be filed. Can such issues be brought to trial?

The statutory provisions pertinent to this subject may be found in title 3, chapter VI., part 2 of the Revised Statutes (3 Banks, 7th ed. 2293),* and in section 2715 of the Code of Civil Procedure. By section 2 of the title above named, every executor or administrator is enjoined, within a reasonable time after qualifying, to make—with the aid of appraisers appointed by the surrogate—a true and perfect inventory of all the goods, chattels and credits of his decedent.

Section 4 provides that the appraisers shall take and subscribe an oath that they will truly and impartially appraise the personal property which shall be exhibited to them.

Section 5 directs that the appraisers shall, at a time and place previously fixed upon and proclaimed, proceed to estimate such property and to set down each article thereof in the inventory with a statement of its value.

Section 16 requires that the inventory returned by the executor or administrator shall be verified by the oath of its maker that it is “in all respects just and true,” and “contains a true statement of all the personal property of the deceased which has come to the knowledge of such executor or administrator.”

By section 2715 of the Code, a creditor or person interested in a decedent's estate may present to the surrogate's court proof of affidavit that its executor or administrator has failed to return an inventory or a sufficient inventory, and, if the surrogate is satisfied that such executor or administrator is in default, he must make an order requiring the delinquent to return such inventory, or such further inventory, as the case may be.

* 2 R. S. 82, § 1, *et seq.*

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The section of the Code above cited is, so far as concerns the matter now under discussion, a mere consolidation of certain repealed provisions of title 3, ['] *supra*, and has not in any manner enlarged the responsibilities of executors and administrators, or the rights and privileges of creditors, legatees or next of kin, as regards the making and filing of inventories (*Throop's Code*, § 2715, *n.*; *Matter of McIntyre*, 4 *Red.* 489; *Greenhough v. Greenhough*, 5 *Id.* 191).

Now, before the enactment of the Code, it was settled by numerous decisions that a sworn inventory ['] could not, in a proceeding for that purpose, be falsified; that when its maker came to his accounting, it was competent for the parties in interest to prove that he had not charged himself with all the property that had reached or should have reached his hands, or with the true value thereof; but that the surrogate was not authorized to receive evidence impeaching an inventory, which, in the face of allegations tending to dispute its correctness, the executor or administrator had under oath pronounced to be just and true (*Thomson v. Thomson*, 1 *Brad.* 24; *Montgomery v. Dunning*, 2 *Id.* 220; *Waring v. Waring*, 1 *Red.* 205; *Sheering v. Public Adm.*, 2 *Id.* 421).

In *Thomson v. Thomson* (*supra*), Surrogate [4] BRADFORD, after a careful review of the procedure of the English Ecclesiastical Courts, declared the rule to be well established, that those courts, while they would entertain an application for a corrected or additional inventory, would not, in case the accuracy of the inventory already filed was reasserted on oath by the executor or administrator, receive evidence tending to falsify it. It was only in case the allegations of the applicant for a new or amended inventory were admitted or were not disputed that the courts would order the filing of another. By the English practice an inventory was required, as it is here

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required by statute, to be verified by the oath of the executor or administrator. It could not, therefore, be received without such verification, and manifestly, its maker could not be compelled to swear to the truth of an amendment or addition which he had, in substance, twice denied under oath. The only course, therefore, was to postpone, until the period of accounting, ['] all disputed questions respecting the existence of assets or their valuation. It might then be shown that property had been omitted from the inventory which ought to have been included therein, and that assets had yielded or should have yielded a larger sum than the value at which they had been appraised.

This I hold to be the proper practice under the Code.

Motion denied.

FERGUSON, MORTGAGEE, v. WOOLEY, ET AL.,
MORTGAGORS, &C.

SUPREME COURT, FOURTH DEPARTMENT, ONEIDA
COUNTY, SPECIAL TERM, MARCH & APRIL, 1888.

§§ 2388, 2391, 2397, 2401, 3265.

Taxation of costs.—Papers required to be served and furnished court on motion for new.—Foreclosure by advertisement.—Items of cost taxable.

It is not necessary to serve copies of the papers used before the clerk on a taxation of costs, with the notice of a motion for a new taxation thereof, but where there is a dispute as to what papers were so used, the moving party should obtain and present a certificate of the clerk showing fully what papers or records were used, and should also produce to the court the original papers or certified copies thereof.[¹]

In a proceeding for the foreclosure of a mortgage on real property by

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advertisement, costs cannot be taxed for matter contained in the notice of sale not required to be inserted therein by section 2391 of the Code of Civil Procedure, nor for serving persons not required by the Code to be served although it may have been a prudent measure to serve them.[³]

In such a proceeding, the mortgagor is entitled to tax costs for a copy of the notice of sale to keep, and a copy for the printer;[⁴] and for copies for those required or expressly permitted by the Code of Civil Procedure (§ 2388) to be served;[⁵] devisees under the recorded will of a deceased mortgagor, and a lessee under a recorded lease may be served as subsequent grantees,[⁶] and where minors under 14 years of age are devisees of a mortgagor, a notice is properly served on their guardian, and may be charged for;[⁷] where there was no reason why one notice was not all that was required to be annexed to four affidavits of service, the charge for one only should be allowed, although four were actually used,[⁸] and a charge cannot be made for a copy served on the auctioneer when he was also the mortgagor's counsel.[⁹]

Collins v. Standish (6 How. Pr. 493), followed.[²]

(Decided March 20 and April 16, 1886.)

Motion by mortgagors for a new taxation of the costs of a foreclosure of a mortgage of real property by advertisement.

Sufficient facts are stated in the opinion.

T. L. Cross, for mortgagors and motion.

A. N. Sheldon, for mortgagee, opposed.

MERWIN, J.—A preliminary objection is taken that copies of the papers used before the clerk were not served with the notice of this motion. Such service was not necessary (*Webb v. Crosby*, 11 Paige, 193). There seems, however, to be some question as to what papers were, in fact, used. The attorney for the mortgagee claims that papers and records were used before the clerk that are not named in the affidavit of the moving party. This matter should, I think, be

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settled by the certificate of the clerk. The moving party should obtain and present a certificate of the clerk showing fully what papers or records were used, and then should produce to the court the original papers or certified copies. In other words, the matter should be before the court as it would be if a formal return was made by the clerk. The particular question in this case seems to be whether any other records were considered by the clerk except those set out in a search that seems to have been produced by the mortgagors.

Unless the counsel can otherwise agree, this motion will have to be sent over to the next term to enable the moving party to obtain the necessary certificate and present the proper papers.

The argument of the motion was suspended as directed in the foregoing opinion, and continued during the following term.

MERWIN, J.—The moving party now presents a certificate of the clerk, showing what papers were before him on the taxation, and the same papers are now produced on this motion. That is, I think, sufficient, and I now proceed to the consideration of the controverted items of costs.

The case of *Collins v. Standish* (6 *How. Pr.* 493), ['] has long been followed on the subject of statute-foreclosure costs. So far as the questions there decided are applicable to this case, I think that at special term it ought to be followed.

It was there held that matter inserted in the ['] notice, which was not required to be inserted by section 4 of the act (2 *R. S.* [6th ed.] 848), which corresponds to section 2391 of the Code of Civil Procedure, should not be considered in determining the number of folios to be allowed in making up costs. It was also held that a charge could not be made for

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serving notices on persons not required by the act to be served, although it may have been a prudent measure to serve them.

In the present case the length of the notice is objected to. It is charged at twenty-three folios. I fix it at twenty-one. A charge is made for drawing notice and for a copy to keep and a copy for printer. The two copies are objected to but are ['] allowable within the Collins case above referred to, although there is some ground for saying that they are somewhat fictitious. It is also objected that printed copies cannot be charged for. The statute does not make this distinction.

Charge is made for thirty-four copies to serve, and this is objected to as largely in excess of what is ['] proper. By section 2401, the charge is limited to "those required or expressly permitted to be served by this title." Under section 2388, subdivision 4, the notice must be served on the mortgagor, or if dead, then upon his executor or administrator, and it may be served upon a subsequent grantee or mortgagee whose conveyance was recorded at the time of the first publication of the notice of sale, also upon the wife or widow of such mortgagor or grantee, or upon any person, then having a lien on the property, subsequent to the mortgage, by virtue of judgment or decree. This indicates the notices required or expressly permitted. It is conceded by the moving party that Irene M. Wooley and Dewitt C. Wooley, as mortgagors, John Carey, subsequent mortgagee, Thomas McCurran and U. C. & B. R. R. Co., subsequent grantees, were properly served. The two devisees under the recorded will of the deceased mortgagor, Maria N. Wooley, were, I think, properly served as subsequent grantees, and the D. & H. Canal Co., under its recorded lease from the U. C. & B. R. R. Co., should also be deemed a grantee. This

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makes eight in number. Among the others served, a number are said to be the heirs of Andrew Glen. But he apparently never had any interest in the property. His four acres were not covered by any of the mortgages. Nor did the mortgage to Charles W. Kimball of date December 11, 1865, cover any of the property. The nine acre piece was excepted. Divers persons are served as heirs of Barney McCurran. Assuming the identity of the heirs is apparent, that class of persons is not within the category of the statute. The law does not require or expressly permit such service. The rule in the Collin's case applies. The interest of Alvina Moffit was not covered by the mortgages, and on that ground her heir Mary Kimball had no interest in the foreclosure.

[?] It looks to me that the eight above named are the only ones for serving on whom a charge can be made. The devisees above referred to of Maria N. Wooley, are minors under fourteen, and as part of the service on them a notice had to be delivered to their general guardian Dewitt C. Wooley. It was proper, therefore, to charge for an additional copy of notice. The affidavits required to be made, and filed and recorded by sections 2397 and 2398 are eight in number, and are annexed to each other and filed and recorded together, on March 12, 1886. Seven printed notices are attached, one to each of seven of the affidavits. The query is whether all of these printed notices were necessary. Section 2397 as amended in 1882, provides that "one copy of the notice suffices for two or more affidavits, where they all refer to it and are annexed to each other, and filed and recorded together." Four of the affidavits to which notices are attached are made by the mortgagee or his counsel, three of them being upon the day of sale and one by the counsel afterwards. There is no reason apparent why one notice was not all that was necessary for

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these four affidavits. The other three should be disallowed as unnecessary.

[*] A charge is made for copy, notice of sale, served on auctioneer. This was not necessary. The auctioneer was the counsel for the mortgagee, and the draft, notice and copy, to keep, previously allowed, should suffice for the purposes of the sale.

It was proper, I think, to charge for thirteen weeks publication. The foregoing suggestion covers the main points. I indicate upon the bill the specific amounts I allow making a total of \$245.53 instead of \$387.74, as taxed. An order in proper form may be submitted. No costs on this motion.

CAHILL v. CAHILL.

CITY COURT OF NEW YORK, SPECIAL TERM, MAY,
1886.

§ 66.

*Attorney's lien.—When attaches in action for assault and battery.—
When will not prevent discontinuance of action.*

An action for personal injuries is not assignable, and a lien cannot attach to it until it has been established by verdict, when it becomes for the first time certain and vested.

An attorney's lien for costs does not attach to a cause of action for assault and battery so as to prevent a discontinuance of the action without costs where the plaintiff has forgiven the defendant, and the parties want the further prosecution of the action stopped. Section 66 of the Code of Civil Procedure, providing for attorney's liens, does not contemplate such a case.

(Decided May 18, 1886.)

Application by plaintiff for leave to discontinue action.

Cabill v. Cabill.

The facts sufficiently appear in the opinion.

Samuel H. Randall, plaintiff's attorney.

T. H. Hurley, defendant's attorney.

MCADAM, Ch. J.—The action is for personal injuries, to wit, assault and battery, and has been called for trial; the parties are relatives, and the plaintiff states in open court that she has “forgiven her trespassers,” has renewed her friendship and wants the further prosecution of the action stopped. The plaintiff's attorney insists that the old feud be reopened and the fight go on to the end, that he may get his taxable costs in case a recovery is had. Section 66 of the Code does not contemplate such a case. The cause of action is purely personal, not assignable (71 N. Y. 443),* and a lien can hardly attach to it until it has been established by verdict, when it becomes for the first time certain and vested. The parties to a mere personal controversy should be allowed to settle their differences even without the concurrence of their attorneys (Ward v. Orton, 12 Abb. N. S. 444).

The language of the Holy writ “Blessed are the peace-makers,” &c., accords with the maxim, “*Inter est reipublicae ut sit finis litium*,” and every principle of law order and propriety agree that the peace of the family now prevailing should not be broken up by the dark visage of intestine war, waged not for principle, but “for costs.”

The plaintiff will, therefore, be allowed to discontinue the action without costs, the defendant consenting thereto, and the parties may depart in peace. The attorney who is a mere agent or employe cannot stand in his employer's way, nor be allowed to oppose her interests and defy her directions in a matter purely personal to herself.

* Coughlin v. N. Y. C. & H. R. R. Co.

Estate of Corn.

ESTATE OF ABRAHAM CORN, DECEASED.

SURROGATES' COURT, NEW YORK COUNTY, APRIL,
1886.

§§ 2685, 2832.

Letters of administration.—Power of surrogate to revoke—when surrogate may revoke letters appointing guardian of an infant's estate.

The surrogate's authority to revoke letters of administration is solely derived from section 2685 of the Code of Civil Procedure.^[1]

To authorize a surrogate to revoke letters of administration on the ground that they were "obtained by a false suggestion of a material fact," it must appear that a false suggestion of a fact material to the proceeding, for the appointment of an administrator, was made to the tribunal by which the letters were granted.^[2, 3]

The fact that a widow petitioned for the appointment of her father-in-law as joint administrator with her, of her deceased husband's estate, upon the father-in-law's false statement that "under the law it was necessary" that two administrators should be appointed, will not authorize the revocation by the surrogate of letter granted on and in accordance with such petition.^[3]

The surrogate cannot revoke letters of guardianship of an infant's estate, even though such revocation would seem to be for the best interests of the infant, unless facts are established which constitute a sufficient ground for revocation within one or more of the five subdivisions of section 2832 of the Code of Civil Procedure.^[4]

Ledwith v. U. S. Trust Co. (2 Dem. 439), followed.^[4]

Where the mother of minor children, whose father was dead, moved that letters of guardianship of their person and estate granted to her deceased husband's father upon her petition be revoked, and averred that she signed the petition upon the false statement of such guardian that it was necessary that the children have two guardians, and supposing that letters of guardianship would also be granted to her—*Held*, that the surrogate had not power on these facts to revoke the letters appointing the guardian of the infant's estate,^[4] or to direct that the mother be associated with him in such guardianship,^[5] but that, if the relation between him and the mother were to be inharmonious, the infants' welfare would be

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promoted by substituting her for him, and a decree might be entered removing him from office as guardian of the infants' persons, unless he resigned the guardianship and consented to the granting of new letters to himself and the petitioner.^[6]
(Decided April 13, 1886.)

Petition by Annie Corn for the revocation of letters of administration granted to her and one Samuel Corn, on her deceased husband's estate; also for the revocation of letters of guardianship of the person and estate of her two minor children, granted to said Samuel Corn, on her petition.

The opinion states the facts.

Cardozo & Newcomb, for petitioner and motion.

Townsend, Dyett & Einstein, for administrator, etc., opposed.

ROLLINS, S.—This decedent died in November, 1885, leaving his widow, Annie Corn, and his infant child, Percival Corn, him surviving. On January 5, 1886, letters of administration were granted upon the widow's petition, to herself and to Samuel Corn, the father of the decedent. On the same day also in accordance with Mrs. Corn's petition, Samuel Corn was granted letters of guardianship of the person and estate of her infant son. She now asks the surrogate to revoke those letters of guardianship and to revoke also the letters of administration so far as they confer any authority upon this respondent.

Mrs. Corn alleged in her petition that on or about January 3, 1886, the respondent advised her that under the law it was necessary that two administrators should be appointed for taking charge of her husband's estate, and two guardians for protecting the interests of her child. She alleges further that

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the respondent told her that he had made arrangements for the appointment of himself and her as joint administrators and guardians; that accordingly, at respondent's request, she went to the office of his counsel, Mr. Dyett, and subsequently to the surrogate's office, and signed certain papers which she supposed to relate to the appointment of respondent and herself as such guardians and administrators.

It appears by her petition that on January 5, 1886, Mrs. Corn entered into a certain written agreement with the respondent under a misapprehension, as she claims, respecting its true nature and effect. A copy of that agreement is annexed to the petition. It substantially provides that administrator Corn shall have the sole care and custody of all the property of the estate until the distribution thereof, according to law, and recites that such authority had been yielded to him by the petitioner because of his furnishing the sureties upon the administration bond, petitioner herself having been unable to procure the requisite security for her own appointment as sole administratrix. The petitioner insists that these recitals are false; that she was not informed before signing the agreement, and when she executed it did not, in fact, understand that she was virtually surrendering to the respondent the exclusive possession and control of the property of the estate.

The opposing affidavits of the respondent allege that the agreement in question was drawn in duplicate after consultation between himself and the petitioner, and that the latter read it before execution; and that at Mr. Dyett's request she also read the petition for the appointment of herself and the respondent as administrators, and that she took the same course in respect to the petition for appointment of the respondent as guardian of her son. Mr. Corn denies that he

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ever said to the petitioner that two guardians or two administrators were required by law.

It appears from the affidavit of Mr. Dyett that he prepared for execution the agreement and the two petitions ; that he was present when Mrs. Corn signed the three papers ; that he explained to her their contents and handed them to her for examination ; that she apparently read them through and afterward signed them without any protest and without suggestion that she did not thoroughly understand what she was doing.

The surrogate's authority to revoke letters of ['] administration is solely derived from section 2685 of the Code of Civil Procedure (*O'Brien v. Neubert*, 3 *Dem.* 156). It cannot be claimed that the allegations of the petition in the case at bar would justify revocation under any of the subdivisions of that section except subdivision 4. Now, can I find upon the proof before me that the letters here in question "obtained by a false suggestion of a material fact"? This expression first came upon the statute books at the adoption of the Code. The law previously in force applicable to this subject (chap. 460, § 34, *Laws of 1837*, 3 *R. S.* [Banks' 5th ed.] 164), provided that letters of administration might be revoked whenever it should appear to the surrogate that they had been issued "on or by reason of false representation made by the person to whom the same were granted." For that provision the one here invoked was substituted to cover such cases as were referred to by the supreme court in *Proctor v. Wanmaker*, 1 *Barb. Ch.* 302 ; see *Throop's Code*, note to § 2685).

In *Proctor v. Wanmaker*, it was held that independently of the statute of 1837, the surrogate had power to revoke letters of administration where there had been a false suggestion of a material fact or a lack of

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notice to the parties rightfully entitled to administration. The cases cited by the supreme court in support of that proposition were all cases in which letters had been revoked upon a discovery of false representations made to the tribunal by which such letters had been granted, or that from such tribunal the lack of proper notice had been concealed. See *Cornish v. Cornish*, 1 *Lee's Ecc.* 14; *Burgis v. Burgis*, *Id.* 121; *Drummond v. Hamilton*, *Id.* 357; *Smith v. Corry*, *Id.* 418; *Lord Trimlestown v. Lady Trimlestown*, 3 *Hagg. Ecc.* 243.

['] Now, even upon the petitioner's own showing, I cannot find that the respondent obtained his letters by any false suggestion to the surrogate of a fact material to the proceeding for the appointment of administrators. The petition must, therefore, be denied. It is not my intention in so denying it to pass upon any question as to the validity or effect of the agreement above referred to between the parties to this proceeding. Whether that is such an agreement as administrators may lawfully enter into, and as courts are bound to recognize, may hereafter become the subject of consideration, but need not now be determined.

['] I had occasion, in deciding *Ledwith v. Union Trust Co.* (2 *Dem.* 439), to review the grounds upon which the surrogate is authorized to remove a guardian appointed, as was this respondent, by virtue of title 7, chapter 18 of the Code of Civil Procedure. I adhere to the conclusion there announced, that as respects the guardianship of an infant's estates, the surrogate cannot revoke letters, even though such revocation would seem to be for the best interests of the infant, unless facts are established which constitute a sufficient ground for revocation within one or more of the first five subdivisions of section 2832 of

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that Code.* No such facts have been established in the case at bar.

I do not discredit Mrs. Corn's allegation that when she signed the petition asking for the respondent's appointment as guardian, she supposed that she herself would also be granted letters; and accordingly, if such a course could properly be pursued, I would [°] now direct that she be associated with the respondent in the guardianship. But I have no power to give such a direction. It would be gratifying to the court if the respondent should pursue the course which his counsel, at the argument of this proceeding, declared would meet with his approbation; that is, to resign the guardianship and consent to the grant [°] of new letters to himself and the petitioner. If he shall not see fit to adopt this course, a decree may be entered removing him from his office as guardian of the infant's person, for if the relations between the petitioner and the respondent are to be inharmonious, the infant's welfare will, in my judgment, be promoted by substituting the former for the latter as his personal guardian.

* See *In re King*, 8 N. Y. Civ. Pro. 159, note.

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WHITNEY, ET AL., APPELLANTS, v. HIRSCH AND
ANOTHER, RESPONDENTS.SUPREME COURT, FIRST DEPARTMENT, GENERAL
TERM, JANUARY, 1886.

§§ 635, 3343.

*Attachment—In action on contract induced by false representations—
Using copy affidavits—Fraudulent preferences.*

An action to recover the value of goods sold and delivered is an action on contract, notwithstanding it is alleged in the complaint that the sale was induced by false representations; and upon proof that the defendant has disposed of his property with intent to defraud his creditors, an attachment may issue therein.^[1, 10] [BRADY, J., dissenting.]^[13]

Bogart v. Dart (25 *Hun*, 395), followed;^[2] *Wittner v. Von Minden* (27 *Id.* 234); distinguished;^[4, 10] followed, by BRADY, J., dissenting;^[11] *Muser v. Lissner* (67 *How. Pr.* 509); *Ledwick v. McKim* (53 *N. Y.* 307), distinguished, by BRADY, J., dissenting.^[14]

It seems, that if the allegations of fraud in the complaint and liability of the defendant to arrest and imprisonment upon the recovery of judgment, were held to deprive the action of its character as an action on contract, the action would be one for an injury to personal property in consequence of fraud, and one in which an attachment would issue.^[2, 12]

The right of the plaintiffs in an action, to an attachment against the defendants' property, may be supported by extracts from, and copies of affidavits, made and filed in an action brought by other parties against the same defendants, when it appears that the plaintiffs are unable to obtain affidavits from the persons who made such affidavits.^[5, 6, 7]

Bennett v. Edwards (27 *Hun*, 352), followed;^[8] *Wilmerding v. Cunningham* (65 *How. Pr.* 345), distinguished.^[6]

Where one of two copartners makes a general assignment for the benefit of all his creditors of his own and the firm's property, and

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therein prefers his partner as a creditor, such preference is fraudulent, and renders the assignment void.^[*,*]

Clafin v. Hirsch (19 *N. Y. Weekly Dig.* 248), followed.^[*]
(Decided January 29, 1886.)

Appeal by plaintiffs from an order vacating an attachment issued against the defendant's property.

The opinion states sufficient facts.

Charles H. Smith, for plaintiffs-appellants.

Blumensteit & Hirsch, for defendants-respondents.

DANIELS, J.—According to an affidavit of one of the plaintiffs, on which, with others, the attachment was issued, and the amended complaint in the action, the plaintiffs sold and delivered to the firm of Emil Hirsch, alleged to be composed of the defendants, goods and merchandise amounting in value to the sum of \$1,080.25; and it is for the recovery of that amount that judgment was demanded in the action. But it has been insisted that an attachment could not issue in the action brought for the recovery of this indebtedness, for the reason that it is alleged in the complaint, and also stated in the affidavits, that fraudulent representations were made concerning the financial condition of the business, by which the plaintiffs were induced to sell and deliver the goods. This, however, under section 635 of the Code of Civil Procedure, did not deprive the plaintiffs of the right to an attachment upon complying with what has been further required to be shown by the next succeeding section. For a warrant of attachment has been allowed to be issued in an action, for the "breach of a contract, express or implied, other than a contract to marry;" and such a breach of contract has been alleged

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in the complaint, and sustained by the affidavits upon which the attachment has been issued. For it has been made to appear that the goods were sold and delivered at the request of the defendants, and that the price to be paid for them was agreed upon, and the debt has become due, and that price has not been paid.

['] These facts present the case of a contract made to pay the purchase price of the goods, and the omission on the part of the defendants to perform their contract, and entitled the plaintiffs to an attachment under this subdivision of the section, by complying with the additional requirements contained in the next section. And the action for the recovery of the debt was not deprived of its character as an action upon contract, by reason of the further fact that the debt had been fraudulently contracted, and the defendants, upon the recovery of a judgment, could be arrested and imprisoned upon the execution. But if it were otherwise, the plaintiffs would not be ['] deprived by the false representations of the right to an attachment. For by subdivision 3 of the same section, an attachment may also issue for any other injury to personal property than that provided for in subdivision 2, in which it may also lawfully issue, or for the consequence of negligence, fraud or other wrongful act, and so far as this action may be dependent upon the allegations of fraudulent representations inducing the sale of goods, it is within this subdivision of the section. For it may also be held to be an action for fraud, as that term has been used in this subdivision, or if not, then for an injury to personal property, which has been defined by subdivision 10 of section 3343 of the Code, to include "an actionable act whereby the estate of another is lessened, other than a personal injury or the breach of a contract." The fraudulent representations made were

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certainly not a personal injury nor the breach of a contract, but they did constitute an actionable act whereby the estate of the plaintiffs was diminished or lessened, so far as they were induced to part with their goods in reliance upon the truth of the representations. And under this definition of an injury to personal property, an attachment might be issued in an action based upon it under subdivision 3 of section 635 of the Code.

[²] This subject was considered in *Bogart v. Dart* (25 *Hun*, 395), where it was held by this general term that an attachment might be issued to recover for advances made upon the faith of forged bills, notes and acceptances, and it was followed in *Weiller v. Schreiber* (63 *How. Pr.* 491).

[⁴] It has been supposed that *Wittner v. Von Minden* (27 *Hun*, 234), by its language restricted this section of the Code so far as to exclude an action of the present description, but it did not, and if it did, as the cases have been prescribed by the statute in which attachments may be issued, the act itself would be required to be followed, rather than a determination tending to abridge its effect. As this case has been presented, it is included within the first subdivision of section 635. But if any doubt could exist as to the correctness of that construction, it would surely be within the provisions contained in the third subdivision of the same section.

The attachment was issued upon the further ground that the defendants had disposed of their property with intent to defraud their creditors, and that charge was chiefly made to depend upon a general assignment executed by Emil Hirsch himself, in which he preferred the other defendant, Tillie Stern, in the amount of \$8,144.31. This preference has been assailed as unlawful, for the reason that she was, in fact, a partner with the assignor in the business carried on in his

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name, and assigned by the assignment, and affidavits have been produced tending very directly to establish the fact that she was a partner in this business.

['] These affidavits were not all made in this action, but in part consisted of copies of affidavits and extracts from others, made and filed in an action against the same defendants brought by Horace B. Claflin and others. These copies and extracts have been included because of an alleged inability to obtain affidavits in this action from persons whose affidavits were made in the Claflin suit.

['] And it has been held in *Bennett v. Edwards* (27 *Hun*, 352), that such extracts may be used under this state of the facts, and the correctness of that conclusion was in no manner doubted in *Wilmerding v. Cunningham* (65 *How*. 345), where only the results deemed to be supported by the affidavits were contained in that upon which the attachment was based, and that was held not to be sufficient, and the same rule was followed in *Greenbaum v. Dwyer* (4 *N. Y. Civ. Pro.* 276).

['] Under the facts, as they have been disclosed, therefore, the extracts from the affidavits on file may lawfully be made use of to support the plaintiffs' right to the attachment. The statements extracted and the affidavits copied were made under the restraints of oaths administered for that purpose, and if they could be shown to be willfully false, the persons making them would be liable to conviction and punishment for the crime of perjury, under the laws of the state, as much so certainly as though the affidavit containing these extracts and those copied was made in this action. These extracts and copies, to a reasonable degree of certainty, establish the fact that the defendant Stern formed a partnership with the defendant Hirsch in the business, and she probably continued to be a partner through the time when the plaintiffs'

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goods were sold and delivered. The only qualification of her relation to the business was stated by her husband to be that he informed Mr. Hirsch that he wanted to withdraw the moneys which had been invested in the business on behalf of his wife. That was objected to by Hirsch because it would break him up to withdraw the capital, and he is stated by her husband to have added, "You remain here; I will engage you as assistant clerk in the business under a salary, arranging that the money was to remain in the business until January 1, 1884, which I consented to on behalf of my wife."

This was not considered by Hirsch to exclude her from her rights as a partner in the business, and he is so stated to have informed the plaintiff's attorney on July 21, 1884, when, according to his affidavit, Hirsch said Tillie Stern and himself were partners. And a like statement is verified by Leo Frank, a copy of whose affidavits made in the Claflin suit was contained in the papers upon which the attachment was issued.

[⁹] As the case was presented, there was certainly reasonable ground for believing that Tillie Stern continued to be a partner with Hirsch all through the times when the plaintiffs' goods were sold and delivered, and the assignment was subsequently made, which was on November 22, 1883, and being a partner in the business, it was fraudulent to prefer her as a creditor in the general assignment made for the benefit of creditors.

[¹⁰] Substantially the same state of facts was presented in the case of *Claflin v. Hirsch*,* where it was held by this general term that the attachment could legally be issued and sustained, for the reason that there had been this fraudulent disposition of the debtors' property.

* Decided, March 28, 1884, and reported 19 *N. Y. Weekly*, 248.

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The attachment issued in this action ought not to have been vacated, and the order vacating it should be reversed, with the usual costs and disbursements, and an order entered denying the motion.

DAVIS, P. J.—[Concurring.]—My brothers BRADY and DANIELS not concurring in their views in this case, it becomes necessary that I should state the grounds on which I think the disposition of the appeal should be made.

[¹] The action is brought to recover for goods sold and delivered. It is therefore an action upon contract. In such an action, under the provisions of section 549, subd. 4, where, for the purpose of arresting the defendant, it is claimed that the defendant was guilty of a fraud in contracting or incurring the liability, it is necessary that the allegations of fraud should be made in the complaint in issuable form, so that they may be tried by a jury or by the court, but this fact does not change the action from one upon contract. It only affects the remedy, provisional and final, and subjects the plaintiff, if he fails to prove the alleged fraud, to bring a new action upon the contract as one not so fraudulently contracted.

As the action, notwithstanding the allegation of fraud, continues to be one upon contract, there seems to me to be no reason why the attachment may not be sustained. The case relied upon by BRADY, J., is [¹] not applicable (*Wittner v. Van Minden*, 27 *Hun*, 234). That was a case where the action was brought to recover damages for an alleged fraud, and not to recover the purchase price of goods sold and delivered.

[²] If the question decided in *Wittner v. Van Minden*, were an open one it might well be doubted whether the attachment in this case could not be upheld under subdivision 3 of section 635 of the

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Code, which gives an attachment in an action for any injury to personal property in consequence of negligence, fraud or other wrongful act; and under the definition of injury to personal property (sec. 3343, sub. 10 of the Code), the inducing of a sale and delivery of property by fraudulent representations is clearly an act for which an attachment is allowable.

I concur, therefore, with my brother Daniels, that the order in this case should be reversed.

BRADY, J.—[Dissenting.]—The complaint herein alleges that the defendants fraudulently contracted the debt for which judgment is demanded, and it is thus brought within the provisions of subdivision 4 of section 549 of the Code, and which distinctly provides that where such an allegation is made the plaintiff cannot recover unless the fraud is established, and further, that a judgment for the defendant is not a bar to a new action upon the contract only. In such an ["] action this court held distinctly that an attachment under the provisions of the Code could not be maintained (*Wittner v. Van Minden*, 27 *Hun*, 234).

The judgment under the complaint in this action in favor of the plaintiffs, would authorize the imprisonment of the defendant if it were not paid. This view renders it perhaps unnecessary to consider any other question suggested upon the appeal. But it may not be improper to observe, it appearing from the affidavits that there is a further suggestion that the property of the defendants was disposed of by them in whole or in part for the purpose of defrauding their creditors, that if the action was simply to recover a sum of money founded upon a contract, and the court was satisfied that a fraudulent disposition of property had been made, it would grant an attachment as one of the provisional remedies secured to litigants by the pro-

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visions of the Code. But this, as already shown, is not such an action. Nothing either in the case of [*] *Muser v. Lisner* (MS. opinion in this department);* or in *Ledwick v. McKim* (53 *N. Y.* 307), at all conflicts with the results stated.

The plaintiffs are bound in the prosecution of their remedy by the allegations in the complaint, and their success, as we have seen, is dependent upon the proof of those allegations. If not successful, they are not deprived, as we have seen also, of a new action founded upon the contract alone, by which the defendants became responsible. They would not be entitled, therefore, even if the evidence sufficiently established the fact, to an attachment in this action upon the ground that the defendants had fraudulently disposed of their property with the intent to defraud their creditors.

For these reasons the order appealed from should be affirmed.

TOWNSEND, AS GAME CONSTABLE OF THE TOWN OF
SCHROEPPPEL, v. HOPKINS.

SUPREME COURT, FOURTH DEPARTMENT, ONONDAGA
COUNTY, SPECIAL TERM, NOVEMBER, 1886.

§ 1897.

*Action for penalty—Indorsement on summons—When not necessary—
Object—Effect of general notice of appearance.*

The object of the requirement of the Code of Civil Procedure (§ 1897), that the summons in an action for a penalty or forfeiture, when a copy of the complaint is not delivered with it, shall have

* Reported 67 *How. Pr.* 509.

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indorsed upon it a reference to the statute giving the penalty or forfeiture, is to give notice to the person sued of the object of the action, and generally for what a recovery is sought.[¹]

Where an action is brought for a penalty or forfeiture by an officer in his official capacity, the office being created and the penalty imposed by the same statute, the character in which the plaintiff sues is sufficient notification of the nature of the action; [²] the object of the statute (*Code of Civil Procedure*, § 1897), requiring an indorsement on the summons, in an action for a penalty or forfeiture when the complaint is not served with it, referring to the statute under which the action is brought, is satisfied, [²] and such indorsement is not required. [^{3, 4}]

Section 1897 of the Code of Civil Procedure,—providing for an indorsement on a summons, served without the complaint, in an action for a penalty or forfeiture referring to the statute pursuant to which the action is brought,—applies only to actions by private persons, and not to an action brought by an officer in his official capacity. [^{3, 4}]

Mayor v. Eisler (2 *N. Y. Civ. Pro.* 125), not followed. [⁵]

The objection that the summons in an action for a penalty does not contain the indorsement required by section 1897 of the Code of Civil Procedure is waived by a general appearance in the action; a general appearance is a waiver of all irregularities. [⁶]

(*Decided November 16, 1885.*)

Motion by defendant to set aside the summons and to dismiss the complaint upon the ground that the summons served does not contain the indorsement required by section 1897 of the Code of Civil Procedure.

The facts sufficiently appear in the opinion.

Goodell & Nottingham, for defendant and motion.

Mead & Stranahan, for plaintiff, opposed.

KENNEDY, J.—This action was commenced by summons only, the plaintiff suing in his official character, and there was no general or other reference to any statute creating an action for penalty.

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After the service of the summons the defendant appeared generally in the action and demanded service of a copy of the complaint.

Such copy was served on the 10th day of August, 1885, from which it appeared that the action was brought by the plaintiff, as game constable of the town of Schroepfel, to recover several penalties given by statute for taking black bass and other fish named in the prohibition from the Oneida river with weirs, nets and other appliances forbidden by said statute.

The defendant after receiving said complaint after such general appearance makes this motion under section 1897 of the Code.

Section 1897 is a part of chapter 15, title 4, article 3 of said code. Said article is entitled "Actions by a private person for a penalty or forfeiture."

The act, chapter 534 of the laws of 1879, entitled "An act for the preservation of moose, wild deer, birds, fish and other game," under which this action is brought, provides: 1st. That all penalties imposed by the act may be recovered with costs of suit by any person in his own name; 2d. By any society in its name; 3d. By the district attorney in the name of the people (§ 33); 4th. By any game constable whose appointment is provided for by said act (§ 38).

['] The object of the statute requiring the indorsement to be made upon the summons, is to give notice to the person sued of the object of the action, and generally for what a recovery is sought (*Cox v. N. Y. Central & Hudson R. R. Co.*, 61 *Barb.* 615).^{*} When the action is brought by a *private person*, the

^{*} To same effect *People v. Bull* (42 *N. Y. Super.* [10 *J. & S.*] 19); *Bissell v. N. Y. Central & H. R. R. Co.* (67 *Barb.* 385); *Avery v. Slack* (17 *Wend.* 86); *Mayer v. Lewis* (4 *Denio*, 269); *Sawyer v. Schoonmaker* (8 *How. Pr.* 198); *Perry v. Tynen* (22 *Barb.* 139); *Andrews v. Harrington* (19 *Id.* 343).

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summons, if unindorsed and unaccompanied by the complaint, gives no notice to the defendant of the cause of action. Hence the reason for requiring the summons to be indorsed.

['] On the other hand, when an action is brought by an officer in his official capacity, the office being created and the penalty imposed by the same statute, the character in which he sues is sufficient notification, and the object of the statute requiring notice is satisfied.

['] I am the more impressed with the idea that this is a proper construction, and that by the Code it was intended to limit the cases in which the indorsement is required, to actions brought by a *private person*, by a reference to the provisions of the Revised Statutes, the place of which is taken by the provisions in question. Title 6 of chapter 8 of part 3 of the Revised Statutes,* is entitled, "Of actions for penalties and forfeitures and provisions for the collection and remission of forfeited recognizances, and fines imposed by courts."

Article 1 of said title is entitled, "Of actions for penalties and forfeitures." The seventh section of this article requires the indorsement on the summons, and extends it to all actions brought, whether by an officer or *private* citizen, to recover a statutory penalty.

The provisions of the Code being a substitute for ['] the Revised Statutes in this regard, and limiting the necessity of an indorsement upon the summons to actions brought by a private person, it seems to me to leave no room for doubt as to the construction to be given to them.

['] I am not unmindful that the court of common pleas of the city of New York has given a different construction to this statute (*Mayor v. Eisler*, 2

* 2 R. S. 280.

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N. Y. Civ. Pro. 125).* It is too late to question [?] that the general appearance by the defendant in the action is a waiver of all irregularities in the summons, and by it the court acquires jurisdiction of the party, and all errors in the original process are then unavailable to him (*Webb v. Mott*, 6 *How. Pr.* 439, and cases cited; *Bissell v. N. Y. Central & H. R. R. Co.*, 67 *Barb.* 385; *Sprague v. Irwin*, 27 *How. Pr.* 51).

The motion is denied, with \$10 costs to the plaintiff.†

* In that case, the court, referring to the fact that the action was brought by a public officer, says :

"It is true that this section occurs in an article entitled, 'actions by a private person for a penalty or forfeiture,' and that all the preceding sections of this article relate to such an action. But it is to be observed that the fact that the action referred to in those sections is for the benefit of, or to be brought by some person, is distinctly mentioned in each of the sections, and that such phraseology is dropped when the section in question is reached, and it would seem, therefore, to have been the intention to make the provisions of section 1897 general, especially as there is no reason which would apply to an action brought by a private person, which would not have equal force when applied to an action brought by a state or municipal corporation," and held that in an action to recover a penalty or forfeiture given by a city ordinance, where the complaint is not served with the summons, there must be indorsed on the summons such a reference to the ordinance as will enable the party served with the summons to turn to the ordinance and determine for what offense he has been sued.

† Motions involving the same questions, in four other similar actions brought against other parties by the same plaintiff, were decided November 16, 1885, in the same manner, on the opinion above reported, by Mr. Justice MERWIN.

Young v. Gregg.

**YOUNG, AS OVERSEER OF THE POOR, &C., RESPON-
DENT, v. GREGG, APPELLANT.**

COUNTY COURT OF SCHENECTADY COUNTY, 1884.

§ 1897.

Action for penalties—When indorsement on summons served without complaint, not sufficient.

The copy of the summons served in an action for penalties and forfeitures, where the complaint is not served with it, should have indorsed upon it a general reference to the statute according to the provisions of which the action is brought, with such a description of the statute as will identify it with convenient certainty, and also specifying the sections, if penalties or forfeitures are given in different sections thereof, for different acts or omissions.^[1]

Where the summons in an action in a justice's court was served without the complaint, and recited that the action was "for forfeitures under the Excise Laws of 1857, and the amendments thereto,"—*Held*, that the action being for penalties under a statute containing several sections, each one of which gives a penalty for acts done or omitted, the summons was defective in not specifying in its reference to the statute the sections thereof by which the penalties were given, and that because of such omission the justice did not acquire jurisdiction of the person of the defendant.^[2,4]

Schoonmaker v. Brooks (24 *Hun*, 553), not followed.^[3]

Appeal by defendant from judgment of a justice of the peace in favor of the plaintiff.

The facts are sufficiently stated in the opinion.

Simon Camkins, for defendant-appellant.

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BEATTIE, Co. J.—This is an appeal from a judgment entered upon a verdict of a jury in an action commenced and tried before justice of the peace Dougall, of the town of Princetown. The summons recites that the action is “for forfeiture under the Excise Laws of 1857 * and the amendments thereto.” By the Excise Laws of 1857, actions for the different penalties given for a violation of the different sections of the act, except certain stated ones,—such as selling to Indians, minors, etc.,—devolve on the overseers of the poor of the several towns of the State, and, on certain conditions, any one else in the name of the overseer of the poor. The forfeitures for which an action may be brought under the provisions of the act of 1857 and the amendments thereto, are as follows: § 13, selling without license liquors in quantities less than five gallons, \$50; § 14, selling liquors without license to be drunk on the premises, \$50; § 17, for public intoxication, fine of not less than \$5 nor more than \$10; § 18, selling to intoxicated persons not less than \$10 nor more than \$25; § 20, selling to habitual drunkards, not more than \$50; § 21, not to sell on Sunday, nor on election days—not less than \$30 nor more than \$200.

Amendments. There are various amendments to the act, but they need not be mentioned, as they do not affect the decision that I think ought to be made in this case. I have stated what the summons contains, giving notice to the defendant as to the object of the action, but the question to be considered right here is, does that summons comply with the provisions of the law as to what shall be indorsed on the summons when the complaint is not served with the sum-

* *Laws of 1857*, chap. 628.

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mons?* Section 1897 Code of Civil Procedure provides that in actions for penalties or forfeitures, if the ['] complaint be not served with the summons "a general reference to the statute must be indorsed upon the copy of the summons so delivered in the following form: (According to the provisions of), etc., adding such a description of the statute, as will identify it with convenient certainty, and also *specifying the section if penalties or forfeitures* are given, in different sections thereof, for different acts or omissions." This is the old statute, *R. S.* tit. 6, art. 2, part II, chap. 8, § 7,† revised and with a few additions. The additions are the requirements to specify, in the indorsement on the summons, the section of the statute to be sued on, where there are more than one section giving penalties. This seems to be a wise amendment, as the object of requiring the statute to be referred to at all, is to give the defendant notice for what he is sued. And in case of different sections of the statute, imposing different forfeitures for acts or omissions, he could not know for what to prepare himself to meet on the trial, in case the particular section be not referred to either in or on the summons. There are in the act of 1857 six sections imposing forfeitures for which an action may be brought by an overseer of the poor, and in each one the issue will be peculiar to itself. That is to say, for instance, an action for a penalty incurred for selling liquor without a license,

* In *Cox v. N. Y. Central & Hudson River R. R. Co.* (61 *Barb.* 615) and *People v. Bull* (42 *N. Y. Super. Ct.* [10 *J. & S.*] 19), it was held that it was not necessary that the notice be indorsed in the summons, but the statute was sufficiently complied with if the notice actually accompanied the service of the summons. This rule was questioned but followed in *Schoonmaker v. Brooks* (24 *Hun*, 553), where the notice was—as in the case here reported—in the body of the summons.

† 2 *R. S.* 280, § 7.

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will require a different complaint, different allegations in the complaint, and a different answer, from the case of selling to an intoxicated person. A different judgment would be asked ; different testimony would be required in the several cases, and the recovery, if there should be a recovery, would be a different sum of money,—the penalty given under section 14 for selling without a license, being \$50, and under section 18 the forfeiture for selling liquor to an intoxicated person ranging from \$10 to \$25. Now the purpose of requiring the indorsement of the reference to the statute under which the action is brought, on the summons, is to apprise the defendant what he is sued for. This is particularly a good provision in actions in justice's courts, where the complaint is not served with the summons. If the summons should not inform him of the nature of the demand that is made upon him, he might not know till the return day of the summons what complaint is made, and an answer required of him in a matter which he then and there hears of perhaps for the first time ; and if the justice should refuse to give him an adjournment to enable him to prepare for trial, great injustice might be done to the defendant. All the authorities concur in saying that the object of the statute is that which I have mentioned, viz., giving the defendant notice of the precise claim that is made upon him.

[*] The cases differ as to where the notice must or may be. In the case in hand, I am of opinion that the reference in the body of the summons "for forfeiture under the excise laws of 1857 and the amendments thereto," is not a compliance with section 1897 of the Code of Civil Procedure. The excise act of 1857 has in it several sections, each one of which gives a penalty for acts done or omitted. In every such case the section enacts that the indorsement on the summons, making reference to the statute, which

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contain different sections giving penalties, the particular section sued on shall be specified. In the summons in this case there is no specification of any section which the prosecutor intended to rely on. The old statute (3 *R. S.* [5 ed.] 783, § 7),* did not contain the provision that the section of the penal statute should be referred to in the indorsement on the summons, and the court, in *Schoonmaker v. Brooks* (24 *Hun*, ['] 553, 555), held that that statute was still in force.†

That case was decided in 1881, but the court's attention apparently was not called to the section of the Code amending section 7 above mentioned. Section 1897 takes the place of the old section; and to hold that a general reference in the summons to the excise law of 1857, without specifying the particular section which is to be relied upon in the action—that statute having many sections giving forfeitures for disobedience of its provisions—were to annul the statute and give no effect whatever to its plain requirements. I

am clearly of the opinion, that the summons in ['] this case is defective in not specifying the section, in its reference to the statute of 1857, and because of this omission the justice got no jurisdiction of the person of the defendant.

I pass upon only one question argued before me, viz.: whether it was necessary to indorse on the summons or embody in it a general reference to the statute of 1857, specifying the section of the statute, and I am of opinion that it was, and because the section—

* 2 *R. S.* 280, § 7.

† This provision of the Revised Statutes was repealed by Laws of 1880, chap. 245, § 1, subd. 4 (5), which took effect September 1, 1880, on which day the portion of the Code of Civil Procedure containing section 1897 went into operation. The summons in *Schoonmaker v. Brooks* was evidently issued and served before this date, and therefore, the sufficiency of the indorsement on it was properly determined by the Revised Statutes.

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the excise act of 1857, containing many sections giving penalties—on which the action was based, was not specified as required by section 1897 Code of Civil Procedure, I am also of the opinion that the judgment must be reversed. And an order to that effect may be drawn and entered, with costs to the appellant.

DIEHL v. LAMBART, IMPLEADED, ETC.

SUPREME COURT, FIRST DEPARTMENT, NEW YORK
COUNTY, SPECIAL TERM, FEBRUARY, 1886.

§§ 1533, 1538, 1647.

Partition—When complaint in action by remainderman states facts sufficient to constitute a cause of action—Dower—Making person having inchoate right of, a party—When no defect of parties.

Section 1533 of the Code of Civil Procedure authorizes an action for the partition of real property by remaindermen or reversioners, subject to the interest of the person holding the particular estate therein, but if it appears upon the trial that the partition cannot be made without great prejudice to the rights of the owners, the complaint must be dismissed.

Where the complaint in an action for the partition of real property brought by a remainderman, set out the title, rights and interests of the several parties in and to the property sought to be partitioned, and that they were all of full age, and demanded a partition or sale of the property, but did not allege that the life-tenant had assented to any sale,—*Held*, that the complaint stated facts sufficient to constitute a cause of action; that it cannot be assumed upon demurrer that a partition cannot be made without great prejudice, and it did not appear upon the face of the complaint that there could not be an actual partition; that the demand in the complaint was inconsistent with the provisions of the Code of Civil Procedure, but did not affect the cause of action.

Scheu v. Lehning (4 N. Y. Civ. Pro. 385), distinguished.

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Where, in an action for the partition of real property, the wife of a tenant in common is made a party defendant, and his share alleged in the complaint to be subject to her inchoate right of dower,—*Held*, that causes of action were not thereby improperly united; that the action was not such as is contemplated by section 1647 of the Code of Civil Procedure, which provides that an action to compel the determination of a claim to a right of dower in the whole or a part of real property cannot be commenced until the expiration of four months after the death of the defendant's husband, and that section did not apply.

Where, in an action for partition, all the necessary parties were before the court, and the rights which they claimed either individually or in a representative capacity appeared from the averments of the complaint, but the plaintiff, who was both a tenant in common, and a trustee of one of her co-tenants, did not sue as such trustee, and was not a party defendant in that capacity,—*Held*, that there was not a defect of parties either plaintiff or defendant.

(Decided February 15, 1886.)

Demurrer to the complaint.

The action was brought by one of three remaindermen, for the partition of certain real property. The complaint was entitled as follows: "Margaret Diehl, plaintiff, against Margaret Lambart, individually and as executrix of the last will and testament of Philip Lambart, deceased, Philip Lambart and Christiana Lambart his wife, Mary Eisele and John Diehl, individually and as trustees under said will, Philip Weber, defendants;" and alleged "that on or about March 29, 1878, one Philip Lambart departed this life seized and possessed of" certain real property in the city of New York therein described; "that said Philip Lambart left a will and testament dated January 7, 1875, which was duly proved before the surrogate of the city and county of New York, and admitted to probate by him May 27, 1878, and duly recorded in his office in Liber 247, page 419; that in and by said will, said Philip Lambart appointed his wife Margaret

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sole executrix thereof, and gave the use, improvement and income of the premises above described to her until her marriage or decease, and devised to his children, Philip, Mary and Margaret (all parties to this action), the reversion and the remainder thereof after the marriage or decease of his said wife, the same to be equally divided among them; that in and by the said will the plaintiff, Margaret Diehl, and her husband, the defendant John Diehl, and the defendant Mary Eisele, were constituted trustees for the portion of his estate devised and bequeathed to his son, Philip Lambart, also defendant herein; that the rights, shares and interests in the premises above described of the parties to this action, are as follows: The defendant, Margaret Lambart, is entitled to the use and income of said premises until her marriage or decease, the plaintiff, Margaret Diehl, and the defendants, Philip Lambart and Mary Eisele, are each seized of and entitled to the undivided one-third part of said premises, subject to the estate of the said Margaret Lambart therein; the share of the defendant, Philip Lambart being subject to the inchoate right of dower of his wife, the defendant Christiana Lambart; that all the parties to this action are of full age; that the premises hereinbefore described are the only lands situate within this state, owned in common by said devisees under said will; that on or about January 17, 1883, the defendant, Margaret Lambart, executed and delivered to the defendant, Philip Weber, a mortgage on said premises to secure the payment of \$1,700 and interest;" the recording of such mortgage, and that it "is a lien on the interest of said Margaret in the whole of said premises," and demanded "judgment for a partition of said premises between said parties according to their respective rights and interests, and in case a partition thereof, or of any part thereof, cannot be made without great prejudice to the owners

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thereof, that the same or such part thereof as cannot be partitioned may be sold under the directions of this court; and the proceeds of such sale, after paying the expenses of this action, be divided between the said parties according to their respective rights, and that plaintiff may have such other relief as may be just."

The defendant, Christiana Lambart, demurred to the complaint on the grounds that it appeared upon the face thereof: (1) that "there is a defect of parties plaintiff in this, that the plaintiff should have sued individually and as trustee under the last will and testament of Philip Lambart, deceased;" (2) that "there is a defect of parties defendant because Margaret Diehl, Mary Eisele and John Diehl as trustees under said last will and testament are necessary parties defendant, and only a portion of them as trustees are made parties defendant;" (3) "that causes of action have been improperly united, to wit, the cause of action alleged in favor of the plaintiff in one right, for partition, is improperly joined with an alleged cause of action in favor of this defendant, Christiana Lambart, in another right, and where neither the plaintiff nor this defendant is in possession;" and (4) that the said "complaint does not state facts sufficient to constitute a cause of action."

D. M. Porter, for defendant and demurrer.

Unless the plaintiff sued as trustee, as well as individually, she is to be taken as suing as an individual only, and is not a party to the action in her representative capacity. *Sheldon v. Hoy*, 11 *How. Pr.* 12; *Root v. Price*, 22 *Id.* 372; *Butterfield v. Macomber*, *Id.* 150; *Merritt v. Seaman*, 6 *N. Y.* 168; *Forrest v. Mayor of N. Y.*, 13 *Abb. Pr.* 350; *Scrantom v. Farmers and Mechanics' Bk. of Rochester*, 33 *Barb.* 527; *Hallett v. Harrower*, 33 *Id.* 537. There is no allegation in the complaint that the life-tenant has assented to

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any sale, without which no partition can be had. *Hughes v. Hughes*, 30 *Hun*, 349; *aff'd*, S. C., 2 *N. Y. Civ. Pro.* 139; *Sullivan v. Sullivan*, 66 *N. Y.* 37. There is no allegation that the property is sought to be partitioned without a sale; in fact, it appears by the complaint, that it cannot be partitioned without a sale. *Code of Civil Procedure*, § 1533. Nor can a sale in partition be made subject to the life estate. *Hughes v. Hughes*, *supra*. There is no allegation in the complaint that Christiana Lambart's husband is dead, but on the contrary he is made a party as if he is living, and she cannot be compelled to litigate her inchoate right of dower in this action. *Sullivan v. Sullivan*, 66 *N. Y.* 37; *Hughes v. Hughes*, 2 *N. Y. Civ. Pro.* 139; *aff'd*, 30 *Hun*, 349; *Scheu v. Lehning*, 4 *N. Y. Civ. Pro.* 385. By section 1647 (last clause), an action to determine this defendant's claim to dower cannot be brought until the expiration of four months after the death of the defendant's husband, and, by the last clause of section 1638, that section does not apply to a claim for dower.

G. & M. Levy, for plaintiff, opposed.

No one can be both plaintiff and defendant in the same action. *Sherwood v. Barton*, 23 *How. Pr.* 533; S. C., 36 *Barb.* 284; *Cole v. Reynolds*, 18 *N. Y.* 74-77; *Niely v. Niely*, 11 *N. Y. Weekly Dig.* 487.

As long as all the necessary parties are before the court, so that a complete disposition of the matters in controversy can be made, it is immaterial whether they are plaintiffs or defendants. If the complaint states a valid trust at all, the effect would simply be that the land allotted to the alleged *cestui que trust* would be set apart to the plaintiff and the defendant trustees as such. The objection that plaintiff should have sued individually and as trustee, is untenable. It would not be necessary to state that fact in the title of the

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action so long as the necessary facts are set up in complaint, showing that plaintiff is not one of said trustees. . . . At any rate, the defect, if any, does not affect any substantial right, and must be disregarded on demurrer. *Ayres v. Lawrence*, 59 *N. Y.* 192. . . . There is no force in the suggestion of defendant's counsel that Christiana Lambart cannot be compelled to litigate her inchoate right of dower in this action. Section 1647 of the Code applies only to actions to compel determination of a claim to real property. This is not such an action. On the contrary, the claim of Christiana Lambart to an inchoate right of dower in the share of her husband Philip is not disputed, but is expressly recognized in the complaint as a valid right and claim, and her inchoate right of dower will simply attach to the share set apart to her husband.* . . . On the question of possession there is nothing in the complaint to show that plaintiff and defendants are not in possession. The complaint shows actual or constructive possession, and parties seized in fee of land may maintain partition though it is subject to a right of possession in trustees created under a will for the purpose of executing the trust. *Chapman v. Cowenhoven*, 7 *Hun.* 341. Even an existing admitted life estate, although covering the whole premises, does not prevent the remainderman from being deemed in possession. *Blakely v. Calder*, 15 *N. Y.* 617.

Whatever doubts have heretofore existed as to the right of a remainderman to bring partition while there was an outstanding life estate, is now settled by section 1533 Code of Civil Procedure. . . See Mr. Throop's note on this section, showing that it was enacted to meet such a case. . . . Section 1647 of the Code, also cited by defendant, does not apply to this case. There is no attempt here made to determine defendant,

* See *Huntington v. Huntington*, 9 *N. Y. Civ. Pro.* 182.

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Christiana Lambart's claim to dower, for the reason that her interest herein is simply inchoate and not a dower right.

LAWRENCE, J.—I am of the opinion that the complaint states facts sufficient to constitute a cause of action. Section 1533 of the Code of Civil Procedure authorizes an action for the partition of real property by remaindermen or reversioners, subject to the interest of the person holding the particular estate therein. The demand in the complaint that the property be sold is inconsistent with the provisions of the Code, but the demand does not affect the cause of action. For aught that appears upon the face of the complaint, the property can be actually partitioned. It may appear upon the trial that the partition cannot be made without great prejudice to the rights of the owners, in which event, under section 1533 of the Code, the complaint must be dismissed; but it cannot be assumed upon demurrer that a partition cannot be made without such prejudice.

The third ground of demurrer cannot, I think, be sustained.

This is not such an action as is contemplated by section 1647 of the Code, and the provisions of that section do not apply. In regard to the other grounds of demurrer I deem it sufficient to say that as all the parties are before the court, and as from the averments in the complaint, the rights which they claim either individually or in a representative capacity appear, I do not think that it can be said that there is a defect of parties, either plaintiff or defendant. The case of *Scheu v. Lehning* (4 *N. Y. Civ. Pro.* 385), is distinguishable from this, because there it appeared that an actual partition could not be had. Here it does not so appear upon the face of the complaint.

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Besides, that case arose upon a trial and not upon a demurrer to the complaint.

There must be judgment for plaintiff overruling the demurrer, with leave to the defendant to answer over on payment of costs.

ABEEL, ET AL., APPELLANTS, v. ANDERSON.
ALLEN, AS ASSIGNEE, ETC., RESPONDENT.

SUPREME COURT, FIRST DEPARTMENT, GENERAL
TERM, MARCH, 1886.

§§ 1405, 2446, 2447.

Execution—Extent of lien of—When lost.

The provision of the Code of Civil Procedure (§ 1405), that the goods and chattels of a judgment debtor, when situate within the jurisdiction of the officer to whom an execution against property is delivered, are bound by the execution from the time of the delivery thereof to the proper officer to be executed, relates only to such property as can be levied upon and sold under the execution, and there must be an actual levy during the life of the execution, or otherwise the lien of the execution is lost.

Where an execution against property was issued to the sheriff, who demanded its payment from the judgment debtor, and thereafter the judgment debtor made a general assignment for the benefit of creditors, and the execution was returned unsatisfied,—*Held*, that the demand made by the sheriff did not create such a lien on the debtor's property within his county as would entitle the creditor to an order that it be delivered to a receiver appointed in supplementary proceedings.

(Decided March 5, 1886.)

Appeal from order denying motion that property in the hands of the respondent as assignee of the

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defendant and judgment debtor be delivered to his receiver to be applied on account of the judgment herein.

The opinion states the facts

E. S. Hatch, for judgment creditor, appellant.

D. Nicoll, for assignee, respondent.

DAVIS, P. J.—The plaintiff, in this action recovered their judgment against the defendant, John J. Anderson, and issued execution thereon on October 1, 1884. On October 8, 1884, the defendant made a general assignment for the benefit of creditors to James L. Allen, the respondent on this appeal. The plaintiffs claim that their judgment and execution was a lien upon the property of the defendant prior to such general assignment. No levy had been made of the execution before the assignment, but a demand for the payment of the execution was made by the sheriff prior to the making of the assignment, and thereafter the execution was returned unsatisfied. Proceedings supplementary to execution were had, and one Henry A. Wheeler was appointed receiver of the property of the defendant. The receiver duly qualified.

The question presented is whether the demand made by the sheriff of payment of the execution operated to give him such a lien upon the property of the defendant as entitles the plaintiffs to the remedy they now seek. The court below held that no lien was acquired.

Section 1405 of the Code of Civil Procedure provides that the goods and chattels of the judgment debtor situated within the jurisdiction of the officer, are bound by the execution from the time of its delivery to the officer to be executed.

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This relates, however, to only such property as can be levied upon and sold by the sheriff; and there must be an actual levy during the life of the execution, or otherwise the lien of the execution is lost (*Hathaway v. Howell*, 54 *N. Y.* 97; *Walker v. Henry*, 85 *N. Y.* 130). In this case, there was no lien upon any property. The execution was returned unsatisfied, and a receiver in supplementary proceedings was thereafter appointed, who duly qualified. If Allen, the assignee of the judgment debtor, did not take title to the assigned property, then the receiver appointed in the supplementary proceedings was vested with such title. But the validity of the assignment in this case is not attacked. It is simply asserted that the judgment and execution and the demand of payment made upon the defendant under the execution in its lifetime created a lien which can be enforced under sections 2446, 2447 of the Code.

We are of opinion, as was the court at special term, that no such lien was created by the demand, and that the title of the assigned property vested in the assignee, Allen, and so far as any facts are developed in this case, can only be reached and affected by the plaintiffs as judgment creditors by an action begun either by themselves or the receiver to set aside the assignment upon grounds affecting its validity.

But whatever may be the remedy that exists, it is quite clear to us that under the provisions of the Code the court had no power to order the application of the property or its proceeds in the hands of the assignee upon the judgment of the plaintiffs for its payment.

The order should be affirmed, with \$10 costs and disbursements.

DANIELS and BRADY, JJ., concurred.

Bowen v. Stilwell.

BOWEN, ET AL., APPELLANTS, v. STILWELL, SUR-
VIVING PARTNER, ETC., RESPONDENT.

CITY COURT OF NEW YORK, GENERAL TERM, APRIL,
1886.

§§ 557, 844.

*Arrest—Proof giving court jurisdiction to issue order of—Certificate to
affidavit taken without the state—When not sufficient.*

To give the court jurisdiction to issue an order of arrest against a person, the facts relied upon as ground, for the arrest must be shown by the affidavit of the plaintiff or some other person,—*i. e.*, by a statement or declaration reduced to writing, and verified by an officer having authority to administer an oath or affirmation.[¹]

An affidavit taken without the State before an officer of another State, cannot be used in this State unless it is accompanied by a certificate of the principal ministerial officer of the county that the officer before whom the affidavit was sworn to was duly authorized to take the same, and that his signature is genuine.[^{1, 3}] There must be a substantial compliance with this requirement, and the certificate must state facts from which the legal inference of authority to administer the oath, and that it was, in fact, administered by the person who had the authority, will irresistibly flow.[⁴] A certificate that the officer taking the affidavit was a notary public duly commissioned and sworn is not sufficient, as it does not indicate what official acts he was authorized to perform, and it will not be assumed that such officer had the same powers as an officer of that name has in this State.[⁵] Such a certificate is also insufficient if it does not state that the certifying officer is acquainted with the handwriting of the officer taking the affidavit.[^{6, 7}]

Williams v. Waddell (5 *N. Y. Civ. Pro.* 191); Harris v. Durkee (5 *Id.* 376); Phelps v. Phelps (6 *Id.* 117; *aff'd*, 32 *Hun*, 642); Smith v. Tim (14 *Abb. N. C.* 447), followed.[^{8, 9}]

Where there was annexed to an affidavit taken without the State, a certificate of the clerk of the county in which it was taken that the officer before whom it was taken "was, at the time of taking the same, a notary public in and for said county duly commissioned

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and sworn, and to whose official acts as such full faith and credit were due, and that " he believed such notary's signature thereto to be genuine,—*Held*, that this was not a sufficient certificate to authorize the use of the affidavit in the state.[^{4, 8, 9, 11}]

McADAM, Ch. J. (concurring in result),—*held*, that a more liberal construction of the statute requiring a certificate to the authority, etc., of an officer of another State before whom an affidavit is taken, should be adopted.[¹⁰]

(Decided April 26, 1886.)

Appeal by plaintiff from an order of the special term vacating an order for the arrest of the defendant.

The action was brought to recover moneys received by the firm of Tompkins & Stilwell, of which the defendant is the sole surviving partner, as the factors, agents and brokers of plaintiff in a fiduciary capacity.

The order of arrest was granted on a verified complaint; an affidavit of Charles H. Bowen, one of the plaintiffs, and an affidavit made by the plaintiffs' attorney. The verification of the complaint and Bowen's affidavit were sworn to in the county of Portage, Ohio, before "C. D. Ingell, Notary Public," and attached to each was a certificate reading as follows:

"The State of Ohio,

"Portage County:

"I, John Porter, county clerk and clerk of the court of common pleas within and for the county of Portage and State of Ohio, do hereby certify that C. D. Ingell, Esquire, before whom the foregoing and annexed affidavit was taken, was, at the time of taking the same, a notary public in and for said county, duly commissioned and sworn, and to whose official acts as such full faith and credit are due, and that the fore-

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going signature purporting to be his, I believe to be genuine.

“In witness whereof I have hereunto subscribed my name and affixed the seal of said court at Ravenna, this eighth day of December, A. D. 1885.

“JOHN PORTER,
“Clerk.”

[L. s.]

The special term held these certificates insufficient, and, as the affidavit of the attorney would not sustain the order of arrest, vacated it.

Horatio F. Averill, for plaintiff-appellant.

Wilson M. Powell, for defendant-respondent.

[1] BROWNE, J.—To give the court jurisdiction to issue an order of arrest against a person the facts relied upon must be presented by the affidavit of the plaintiff or some other person (*Code of Civil Procedure*, § 557). The affidavit required is a statment or declaration reduced to writing and verified before an officer having authority to administer an oath or affirmation.

[2] Section 844 of the Code provides that “an oath or affidavit required, or which may be received, in an action,” &c., “may be taken without the State, . . . before an officer authorized by the laws of the State, to take and certify acknowledgments and proof of deeds, to be recorded in the State ;”—and when accompanied by certificate of the county clerk or other officer as provided by chapter 557, Laws of 1867, that such officer was duly authorized to take the same, and that the signature of the officer is genuine, &c., the same “may be used as if taken and certified in this State, by an officer authorized by law to take and certify the same.”

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The paper purporting to be an affidavit of the plaintiff Charles H. Bowen, taken before an officer in the State of Ohio, and upon which the order of arrest in this action was granted, is not accompanied by a proper certificate, and failed to vest the court with jurisdiction to issue the order of arrest in question.

When the law vests a power in a person to perform an act or acts, and prescribes the manner in which the same is to be authenticated, a court has no right to depart from the plain provisions of the statutes, and it is its duty to exact the evidence which the legislative body prescribes for its guidance under stated circumstances.

The legislature of this State, in order to facilitate the administration of justice, and to avoid cumbersome and special designation of officials, clothed a class of officers in other States with power to administer oaths to persons in those States which might be required for use in this State; the simple qualification of such officer being, that he should be authorized by the laws of his own State, to take and certify acknowledgment and proof of deeds for record within that State. To make certain that such authority was exercised by the proper officer without regard to the official title he bore in his own State, the legislature provided that such authority should be authenticated by the certificate, and that such certificate should be a declaration that such officer was authorized to take acknowledgment of deeds, by the principal ministerial officer of the county for which the officer who administered the oath was authorized to act. It should also contain the evidence that he did, in fact, and in his own person, thus act, which is satisfied by the declaration of the certifying officer that he was acquainted with the handwriting of the officer who administered the oath, and that he believed it to be genuine.

The wild scope of this enactment demanded these

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safeguards relative to their exercise, and no hardship can result from requiring their observance. While justice should not be defeated by technical distinctions, yet too enlarged liberality in the interpretation of evidence claimed to be a compliance and in conformity with a positive enactment is not often more harmful, but it offers a premium for loose and careless practice.

['] Substantial compliance with this statute is all that is required ; but this means that the certifying officer must state enough in his certificate from which the legal inference of authority to administer the oath, and that it was in fact administered by the person who had the authority, will irresistibly flow.

There is nothing in the certificate in question from which by the most liberal construction any inference can be drawn that the officer who administered the oath was authorized to take and certify acknowledgment or proof of deeds for record in Ohio.

['] The statement that he was a notary public duly commissioned and sworn, does not indicate what official acts under the laws of Ohio he was authorized to perform. Presumption of authority to take an acknowledgment of deeds for record in that State cannot be indulged in because the officer bears the title of officer who within our State would have such authority. The evidence contained in the certificate as to the authenticity of the signature of the officer who ['] administered the oath is lacking in the first principle which would give it value as evidence in any court of justice—want of knowledge of the officer's handwriting. The testimony of the certifying officer, if he was called as a witness to prove the signature, would be rejected, if the extent of his evidence was that the signature purports to be that of the officer, followed by the declaration that he believed it to be genuine. This is the extent of the evidence contained

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in the certificate—the belief being predicated upon the fact that the name of the officer who was supposed to have administered the oath was written upon the paper which was certified.

[⁴] The legislature, mindful of the elementary principle of evidence above mentioned, required the incorporation of knowledge of the officer's handwriting in the certificate which the law that commissioned the officer to administer the oath in other States directed should accompany the oath, to entitle it to be read in evidence in the courts of this State.

[⁷] The question determined here is not new. It has received careful consideration from able jurists in recently adjudged cases (*William v. Waddell*, 5 *N. Y. Civ. Pro.* 191; *Harris v. Durkee*, 5 *Id.* 576; *Phelps v. Phelps*, 6 *Id.* 117; *affi'd*, 32 *Hun*, 642; *Smith v. Tim*, 14 *Abb. N. C.* 447).

[⁸] These cases should be followed, for the reason that they give the correct interpretation to the latest enactments upon the law under examination. Some of the earlier cases to which our attention has been directed as having application to the question have been examined by me. I do not find in them any principle in antagonism to the rule laid down in the cases above cited. Under the special statutes, by authority of which the officer performed the duty devolving upon him, enough appeared in the certificate from which the court could in those earlier cases imply a sufficient and substantial compliance with the statute by the authorized officer.

The order will be affirmed, with costs to the respondent.

[⁹] McADAM, Ch. J.—[Concurring.]—I concur in the opinion of Judge BROWNE that the order appealed from must be affirmed, and I do so on account of the recent authorities he cites.

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[¹] My individual opinion is that those cases are not sufficiently liberal in their construction of the statute. The better rule is laid down in prior cases holding that the certificate need not be in the precise language of the statute ; that it is enough if there be a substantial compliance with the statute (*Canandarqua Academy v. McKechnie*, 19 *Hun*, 162, and cases cited). This case applied the rule of liberal construction to a certificate of acknowledgment, which is certainly of as much importance as a county clerk's certificate to the officer's power to act and the genuineness of his signature. The cases cited by the appellant apply the same rule to a county clerk's certificate (3 *Hill*, 461 ;* 12 *Wend.* 223 ;† 20 *N. Y. Weekly Dig.* 215†).

True, the certificate does not say that the officer was "duly authorized to take the same."

Abbott, in his *Law Dictionary*, says, that a "notary public is an officer known in the laws of all civilized countries, . . . and in modern times his most characteristic duty is to attest the genuineness of any deeds or writings in order to render the same available as evidence in any other county." He has been regarded as a sort of *quasi-judicial* officer, and the county clerk certifies that "his official acts are entitled to full faith and credit." He further certifies that "he believes the signature to be genuine." Considering the fact that the notary was "duly commissioned and sworn," in the county where the oath was administered, his official signature must be on file there, and the opinion of the county clerk in whose charge the original signature is, that he believed that attached to the *jurat* is genuine is competent evidence of the fact.

* *Manufacturers' & Mechanics' Bank v. Cowden*.† *Belden v. Devoe*.‡ *Ross v. Wigg*, S. C., fully reported, 6 *N. Y. Civ. Pro.* 263.

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A glance at the laws of Ohio shows that a notary has power to administer oaths (1 *Ohio R. S.* by Williams, § 118), and while the courts will not take notice of the laws of a foreign State, the volume, when produced, is evidence (*Code of Civil Procedure*, § 942).

The affidavit on which the order of arrest was granted shows good grounds for the arrest, and the vacating of the order on subtle technicalities seems to be a sacrifice of substance for form, yet under the [1] strict construction put upon the statute in the cases referred to by Judge BROWNE, I concur in the result arrived at by him, and agree that the order appealed from must be affirmed, with costs.

KEPLER, ET AL., RESPONDENTS, v. MERKLE, ET AL.,
RESPONDENTS.

JOSEPH KOCH, REFEREE, APPELLANT.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM,
MARCH, 1886.

§§ 3296, 3297.

Referee's fees in action of partition—When such referee properly charged interest on the funds in his hands.

The fees of a referee appointed to sell real property pursuant to a judgment in an action, and the disbursements allowed him, are the same as those allowed to the sheriff.[1] Where the referee is required to take security upon a sale or to distribute or apply or ascertain and report upon the distribution or application of any of the proceeds of the sale, he is also entitled to one-half of the commissions upon the amount so secured, distributed or applied, allowed by law to an executor or administrator for receiving and paying out money.[2]

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Such a referee is entitled to auctioneer's fees as a disbursement.^[4]

A referee to take and state the accounts of the several parties in interest in a partition suit, is, in the absence of an agreement fixing a greater rate, entitled to six dollars for each sitting upon the trial of the issues before him.^[5]

Example of a case in which it was held that the proper amount of fees was allowed a referee appointed in an action of partition to sell and state the accounts of the parties in interest.^[1, 2, 3]

Where on a reference to take and state the accounts of the parties in an action of partition, the counsel took time to submit briefs after the submission of the case, and there was a long delay on the part of the referee in distributing the money in his hands, and in making his report, for which there did not seem to be any necessity, and it did not appear that it would have been difficult to have deposited the money in a trust company, or that the referee had not received interest thereon,—*Held*, that the referee was properly charged with interest at the rate he could have obtained from a trust company pending the reference, to wit, three per cent. on the moneys in his hands, from the expiration of sixty days after the filing of the briefs of counsel to the date of paying out the same.^[5, 6, 7, 8]

(Decided March 5, 1886.)

Appeal from the order of the special term determining the fees and allowance of the referee, and charging him with interest on the moneys retained in his hands.

The facts appear in the opinion.

Joseph Koch, referee, appellant in person.

John Hardy, for plaintiff-respondent.

George W. McAdam and *S. S. Harris*, for defendants-respondents.

DAVIS, P. J.—The appellant as referee to sell real property pursuant to a judgment in an action of partition, received the order of reference on July 5, 1881. He subsequently sold the property, and on August 27, 1881, a reference to take and state the accounts of the

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several parties in interest was made to him. The accounting was continued along for a period of time, and divers sums were paid to the respective parties, but the referee kept in his hands a sum belonging to the respondent, Mary Bopp, an infant, until October, 1883. He made his final report on May 27, 1884, to which exceptions were filed. Those exceptions brought up the question of allowance of his fees and charges, and also whether or not he should be charged with interest on the moneys in his hands.

In determining the question the special term delivered the following opinions, which fix the fees of the referee and charges him with interest at the rate of three per cent. :

LAWRENCE, J.*—"I am of the opinion that the exception to the referee's fees should be sustained. By section 3297 of the Code of Civil Procedure, the fees of a referee appointed to sell real property pursuant to a judgment in an action are the same as those allowed to the sheriff, and he is also allowed the same disbursements as the sheriff (see *Richards v. Richards*, 2 *Abb. N. C.* 93 ; *Daly v. Jacob*, 2 *Id.* 97). The sheriff's fees would be : For receiving and posting notices of sale, \$10 ; attending sale, \$10 ; drawing deed, \$5 ; drawing report of sale, \$5—total, \$30. By section 3297 of the Code of Civil Procedure it is also provided that where a referee is required to take security upon a sale, or to distribute or apply, or ascertain and report upon the distribution or application of any of the proceeds of the sale, he is also entitled to one-half of the commissions upon the amount so secured, distributed or applied, allowed by law to an executor or administrator for receiving and paying out money. An executor's fees would be five per cent. on the first

* This decision was filed March 31, 1885.

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\$1,000, \$50; two and one-half per cent. on \$8,550, \$213.75, making a total of \$263.75, one-half of which would be \$101.87 $\frac{1}{2}$, which, being added to the fees above mentioned (\$30), would make a total of \$161.87 $\frac{1}{2}$. The referee claims that there were twenty-two sittings upon the trial of the issues before him. This is disputed by the parties taking exception, but as there is some doubt about it, I shall assume that there was that number of sittings. As no agreement was made that the referee should receive a greater compensation, he can only claim the statutory fee of \$8 for each sitting, which would make \$132, and, allowing him five sittings for drawing his report, he would be entitled for such services to \$30 more, or to \$162. I think that the referee is entitled to the auctioneer's fee as a disbursement.*

"I am of the opinion that the referee should be charged interest upon the amounts received by him, inasmuch as it does not appear that there was any necessity for the delay which has taken place, or that there would have been any difficulty in depositing the money in a trust company pending the litigation. The other exceptions as to the amounts allowed to and charged against the various parties by the referee, I shall not consider, because I regard them as too general in their character. Let an order be drawn in accordance with these views and settled on two days' notice."

LAWRENCE, J.†—"I have re-examined this case on the motion made this morning. In view of the explanation contained in the referee's affidavit as to

* The auctioneer's fee was \$17.

† This opinion was filed June 15, 1885, on an application for a reconsideration of the determination of Judge LAWRENCE stated in his first opinion above quoted

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the cause of the delay, I do not think that he should be charged with interest from the date of the submission of the case, inasmuch as counsel took time in which to submit briefs, and the case does not seem to have been pressed by counsel. If the referee be allowed sixty days from the time of the filing of the briefs of counsel, to wit, until May 3, 1882, for the consideration and determination of the case, I think that is all that he can reasonably ask. As to the rate of interest, I am of the opinion that the referee should not be charged more than he could have obtained from a trust company pending the reference, to wit, three per cent. See decision of VAN BRUNT, J., in *Witthaus v. Schack*, filed April, 1885. Credit will of course be allowed to the referee for the payments made by him, and the interest will only be computed upon the balance or balances remaining after deducting such payments."

We have looked carefully into the case and are of the opinion that it was properly disposed of by the court below, for the reasons assigned in the opinions quoted, and that the appellant has no cause of complaint either as to the amount allowed to him for services or for the amount of interest charged against him for his long detention of the money. He does not show in his affidavit what he did with the money, nor that he had not in fact received interest upon it, and under the circumstances of this case the presumption should be against him.

We affirm the order, for the reason assigned in the opinion of Mr. Justice LAWRENCE, with \$10 costs and disbursements.

BRADY and DANIELS, JJ., concurred.

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SANDFORD, APPELLANT, v. SANDFORD,
RESPONDENT.SUPREME COURT, FIRST DEPARTMENT, GENERAL
TERM, JUNE, 1886.

§§ 1769, 1773, 2266, 2269, 2281.

Contempt—Proceeding to punish for, how commenced—Party ordered to pay alimony when not in contempt—Service of order—Form of order adjudging party in contempt.

An application to punish a party to a matrimonial action for contempt in failing to obey an order directing him to pay alimony cannot be made upon a mere notice of motion, but the party must be brought before the court either by an order to show cause or a warrant of attachment.^[1, 2, 3]

One directed by an order in a matrimonial action to pay alimony is not liable to be brought into contempt for a failure to comply with its directions until the order has been served on him.^[4]

To authorize the punishment of a party for a contempt in a civil proceeding, his contempt must be such as to defeat, impair, impede or prejudice a right or remedy of the party affected by it, and that fact must be ascertained and adjudged by the court directing the punishment which is to be imposed.^[1]

(Decided June 1, 1886.)

Appeal from an order adjudging the plaintiff in contempt and directing his commitment to prison.

The opinion states sufficient facts.

William B. Tullis, for plaintiff-appellant.

Roswell H. Carpenter, for defendant-respondent.

DANIELS, J.—The plaintiff has been adjudged in contempt and ordered to be committed for non-payment of weekly allowances provided for the defendant

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by way of temporary alimony. The order directing the payment was authorized by section 1769 of the Code of Civil Procedure, and for the failure to pay the amount ordered the plaintiff was liable to be adjudged in contempt and committed, under the authority of section 1773 of the same Code. But to obtain an [1] order adjudging him in contempt and directing his commitment, it has been made necessary by this section that at least an order to show cause should be first served upon him.

[2] It has also been provided by the same section that the proceedings to punish the party must be taken as prescribed in title 3 of chapter 17 of the Code. And section 2269 of that chapter and title also requires that an order to show cause shall be made and served or a warrant of attachment shall be issued to bring him before the court.

[3] The application to punish the plaintiff was not brought on in compliance with these provisions, but it was made upon a mere notice of motion, which was not the course prescribed by these sections of the Code, and an objection to that mode of proceeding was taken upon the hearing of the motion.

[4] It was stated in the affidavit of the plaintiff that the order directing the payment of the weekly allowance by him had not been served upon him, and there is no evidence in the papers conflicting with this statement. Until such service of this order was made, the plaintiff was not liable to be brought into contempt for a failure to comply with its direction. *Coddington v. Webb*, 4 *Sandf.* 639 ; *Watson v. Fuller*, 9 *How. Pr.* 425 ; *Macaulay v. Palmer*, decided by this general term, in March, 1886, and not yet reported.*

[5] To punish a party for a contempt in a civil proceeding, his contempt must be such as to

* Reported in this volume, *post*.

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defeat, impair, impede or prejudice a right or remedy of the party affected by it, and that fact must be ascertained and adjudged by the court directing the punishment which is to be imposed (*Code of Civil Procedure*, §§ 2266, 2281). *Sevenarton v. Shope*, also decided by this general term in March, 1886, and not yet reported.*

The order from which the appeal has been taken contains no such adjudication, and because of that omission, it fails to comply with what has been directed by these sections of the statute. In each of these respects the proceeding was wholly defective, and the order from which the appeal has been taken cannot be sustained. It should be reversed with the usual costs and disbursements to abide the event of the action, and without prejudice to a further proceeding against the plaintiff in the form which the law has prescribed it may be taken.

HUNT v. THE PROVIDENCE AND STONINGTON
STEAMSHIP COMPANY.

CITY COURT OF NEW YORK, TRIAL TERM, FEBRUARY,
1886.

§ 829.

*Evidence—When plaintiff may testify to personal transaction with officer
of corporate defendant.*

The plaintiff in an action against a corporation may testify to a transaction with the president of the defendant as its agent; notwithstanding the death of such president, it not appearing that the president was pecuniarily interested in the action

(Decided February 24, 1886.)

* Reported in this volume, *post*.

Hunt v. Providence, &c. Steamship Co.

Motion by defendant for a new trial.

The plaintiff having recovered a verdict, the defendant made this motion upon the minutes.

The opinion states other facts.

Miller, Peckham & Dixon, for defendant and motion.

Goodrich, Deady & Platt, for the plaintiff, opposed.

McADAM, Ch. J.—The plaintiff's contract was made with the defendant (a corporation), through Captain Babcock, its president. He died after suit brought, and before trial. The question presented is whether this circumstance made the plaintiff an incompetent witness to prove the transaction had with the corporation through the agency of the deceased officer. I hold not. The deceased was in no sense a party to the action, and the testimony fails to show that he was pecuniarily interested in the result. The case does not come within the prohibition contained in section 829 of the Code. Prior to the passage of the law permitting parties to be witnesses on their own behalf (*Laws of 1857*, chap. 353), corporators could be admitted to testify for the corporation or against it where the witness did not object (1 *Paige*, 613;* 2 *Sandf.* 686;† 7 *N. Y.* 481;‡ *Angell & Ames on Corporations*, § 652, *et seq.*§). Interest in the recovery no longer disqualifies a witness (*Code of Civil Procedure*, § 828).

The disadvantage the defendant is under is one common to all litigants. Death has removed a witness

* Matter of Kip.

† *N. Y. & Erie R. R. Co. v. Cook*.

‡ *Montgomery Co. Bank v. Marsh*.

§ See also 2 *R. S.* 408, § 81.

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who might otherwise have testified, but the corporation, the real property to the transaction is, in a legal sense, living, and the fact that its main witness is dead, does not prevent plaintiff from testifying. The amendment of 1881 (chap. 703), may not aid the plaintiff, because it relates to banking corporations, but independently of this there is no disqualification: I am aware that where the statute makes a disqualification, the courts will ascertain its purpose, and on grounds of the policy giving effect to its spirit, though they go beyond the letter of the act; still, I think the evidence permitted transcends neither the word of the act, nor its spirit and purpose.

Motion for new trial denied. No costs.

ESTATE OF LOUIS C. HAMERSLEY, DECEASED.

SURROGATE'S COURT, NEW YORK COUNTY, JUNE,
1886.

§ 2624.

Proceedings for probate of will—Determination as to validity, &c. of disposition of personal property, when made—Construction of statute.

No one can command the exercise of the surrogate's jurisdiction to determine the validity, construction or legal effect of a disposition of personal property made by a will in a proceeding for its probate, unless he claims some interest in the personal estate bequeathed, or unless, on the other hand, he claims that, because of the invalidity of the disposition made of such personalty, or of some portion thereof, he is entitled to share in the same under the statute of distributions;[⁹] the mere fact that one has been a party to a controversy over the probate of a will does not entitle him to insist that before the entry of a decree according probate the surrogate shall pass upon all the questions such party may see fit to raise respecting

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the validity, construction or effect of such will or of any of its provisions.^[1, 9]

When a statute empowers a court to do a judicial act in a certain prescribed case, it is, in general, imperative on such court to exercise its authority whenever that case arises, provided that such exercise is duly applied for by a party who has a right to make the application, but he must show that the situation has come to pass in which the authority must be exercised; that he is entitled to invoke that authority, and has adopted the proper proceeding for its invocation.^[2]

The word issue—apart from technical definition—involves the notion of something in dispute between contending parties—something which is affirmed on the one side, and denied on the other.^[3]

In the interpretation of statutes, it is to be presumed that the legislature does not intend to make any alteration in the law beyond what it unmistakably declares, either by express terms, or unmistakable implication; or, in other words, beyond the immediate scope and object of the statute, and general words and phrases, however wide and comprehensive in their literal sense, must be construed as strictly limited to the immediate object of the act and as not altering the general principles of the law.^[7]

Section 2624 of the Code of Civil Procedure, providing for the determination by the surrogate in a proceeding to prove a will of a resident of the State, of the validity, construction or legal effect of any disposition of personal property contained in the will, was enacted in place of Laws of 1870, chap. 359, § 11, and as regards the persons who may invoke, and the occasions for invoking the surrogate's jurisdiction to construe wills and pass upon their effect and validity at the time of admitting them to probate, it has worked no substantial change in the law.^[4, 6]

An occasion does not arise for the exercise of the jurisdiction given the surrogate by section 2624 of the Code of Civil Procedure to determine the validity, construction or effect of a disposition of personal property in a proceeding for the probate of the will of a resident of this State, unless, in accordance with the course and practice of the supreme court, that tribunal would, under similar circumstances, exercise its jurisdiction.^[10]

Where a testator devised his estate to his executors in trust to receive the rents, issues and profits, and apply the same to the use of his widow during her life, and gave the remainder, upon her decease, to the issue of one "H.," or, in case "H." should die without issue, then to such charitable and benevolent institutions as the testator's widow should, by her last will and testament, appoint; and it ap-

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peared that if the testator had died intestate, his widow would have been entitled to the entire personal estate,—*Held*, that the testator's next of kin who had contested the will were not interested in the validity of the power of appointment given the widow, and were not entitled to have the question of its validity determined in the proceeding for the probate of the will;[¹¹] that assuming that the contestants had a contingent interest in the personal estate of the testator an application by them for such a determination should be denied because the executor is not yet called to act upon such devise and may never be.[¹²]

(Decided June 4, 1886.)

Motion by the contestants in a proceeding for the probate of the will of Louis C. Hamersley, deceased, for a determination of the surrogate as to the validity of certain dispositions of personal property therein made.

The opinion states the facts.

George G. De Witt, Jr., and *James C. Carter*, for proponents.

Franklin & Clifford A. H. Bartlett, for contestants, Henry Mason and others.

Strong & Cadwalader, for contestants, D. P. Fearing and others.

M. & N. Niles, for Frances Jones and others.

John C. Shaw, for Helen Langdon.

John E. Parsons, for J. W. Hamersley.

Chalmers Wood, special guardian.

ROLLINS, S.—By the instrument which I lately admitted to probate as this testator's will, his entire

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estate, real and personal, is given to his executors in trust to receive the rents, issues, profits, interest and income, arising therefrom, and to apply the same to the use of his widow during her natural life. The will then proceeds as follows: "Upon her" (the widow's) "decease, I give, devise and bequeath my said estate, real and personal, to my issue. In the event, however, that no issue of mine shall survive my said wife" (and this event is now inevitable, as the testator left no issue), "then, on her decease I give, devise and bequeath my said estate, real and personal, to the male issue of my cousin, J. Hooker Hamersley, then living, and to the male issue of such of them as shall have previously died, leaving issue. . . . In the event, however, that my said cousin shall die without leaving male issue him surviving, or surviving my wife, then, on the decease of my wife, I give, devise and bequeath the whole of my said estate, real and personal, to such charitable and benevolent corporations, located in the State of New York, and incorporated by virtue of the laws thereof, and in such shares and proportions as my wife shall, by her last will and testament, or instrument in writing, for that purpose made, and executed, and acknowledged by her, direct, designate and appoint; and for that purpose, I hereby fully authorize and empower her, to make such last will and testament, or instrument in writing, direction, designation and appointment aforesaid."

The testator's cousin, J. Hooker Hamersley, survived him and is still living.

Certain of the persons, who objected to the probate of the will, now ask the surrogate, to pass upon the validity of the power of appointment, which the testator, by the provision just quoted, has undertaken to confer upon Mrs. Hamersley. It is objected, by counsel for the executors, that there is as yet, no necessity, no practical advantage, and, indeed, no propriety in

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in passing upon this question ; that as under the will, Mrs. Hamersley is to have the entire income for life, and as there may be male descendants of J. Hooker Hamersley, living at her death, the question, whether the power of appointment is good or bad, is of no immediate importance, and may never become important, and that no supposed doubts upon that subject can possibly affect the present rights, of any persons interested in the estate, or the present duties of any persons concerned in its administration.

It is agreed, on all hands, that the authority of the surrogate, in the premises, springs solely from section 2624, of the Code of Civil Procedure. That section is in words following :

“ But if a party expressly puts in issue, before the surrogate the validity, construction or effect of any disposition of personal property, contained in the will of a resident of the State, executed within the State, the surrogate must determine the question upon rendering a decree ; unless the decree refuses to admit the will to probate.”

[] The contestants insist that this provision is precise and definite in its terms, and must be obeyed with literalness ; and that the mere fact that one has been a party to a controversy over the probate of a will, entitles him to insist that before the entry of a decree according probate, the surrogate shall pass upon all questions such party may see fit to raise, respecting the validity, construction or effect of such will, or of any of its provisions.

If this be in truth the clear, unequivocal intentment of section 2624, its directions must be followed, however unnecessary, inconvenient or absurd they may, in the present situation, appear to be. I do not, however, sustain the learned counsel for the contestants in their insistence that the section in question is so clearly worded, and its meaning so obvious, as not

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to call for judicial construction ; on the contrary, it seems to me to be sadly in need of such construction.

I find no difficulty whatever with the word "must" upon which special stress was laid at the argument.

No doubt that word has the mandatory signification which contestants' counsel claim for it. "The surrogate *must* determine ;"—but at whose instance must he, and under what circumstances and conditions and pursuant to what practice and procedure? It is in these respects that section 2624 has a vague and doubtful meaning. I take it that when a statute ['] empowers a court to do a judicial act in a certain prescribed case, it is in general imperative on such court to exercise its authority whenever that case arises, provided that such exercise is duly applied for by a party who has a right to make the application. But it lies upon one who contends that the situation has come to pass in which the authority must be exercised to show that such is the fact, that he is entitled to invoke that authority and has adopted the proper procedure for its invocation.

Now, while there is no embarrassment as regards this word "must," there are other words and expressions in section 2624 whose force and effect is far from obvious.

The surrogate is to act, says the statute, when a party "*expressly puts in issue*" the validity, construction or effect of any disposition of personal property contained in the will. The phrase italicised is one whose exact significance I confess my inability to understand. "Issue" is a word of very definite ['] and precise meaning. Even apart from technical definition it involves the notion of something in dispute between contending parties—something which is affirmed on the one side and denied on the other. It is only by a careless use of words that a mere request

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by a party to a probate controversy that the surrogate shall determine the validity, construction or effect of a will or some portion of a will can be called a "putting in issue" by such party, of such validity, construction or effect.

Again, if the presentation of such a request is to be deemed a putting in issue, and if the word "party," as used in section 2624, means any person who has been a party to the proceeding for probate, this absurdity is the result: One who has no interest whatever under a will, except, for example, as the legatee of a trifling pecuniary bequest given by one of its clauses, may require the surrogate to pass upon the validity, construction or effect of a complicated trust created by another clause. Nay, more: An unsuccessful contestant of a will, though he is not included in the number of its beneficiaries, may require a determination of the construction and effect of any or all of its provisions, not only without the consent, but even against the protest of every person absolutely or contingently interested therein.

Surely an interpretation of section 2624 which would work these consequences should be avoided unless it is unavoidable, and in its stead should be adopted some other more agreeable to convenience, reason and justice (*Maxwell on Interpretation of Statutes*, 2 ed. p. 230).

['] The provision of the Code which is now under discussion was enacted in place of an earlier provision (section 11, chap. 359 of the Laws of 1870). It is as follows:

"In any proceeding before the said surrogate [that is before the surrogate of the county of New York] to prove the last will and testament of any deceased person, as a will of real and personal estate, in case the validity of any of the dispositions contained in such will is contested, or their construction or legal effect

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are called in question by any of the heirs or next of kin of the deceased, or any legatee or devisee named in the will, the surrogate shall have the same power and jurisdiction as is now vested in and exercised by the supreme court, to pass upon and determine the true construction, validity and legal effect thereof."

[⁵] As statutes go, the one just quoted was reasonably perspicuous. Now, Mr. Commissioner Throop, in the note which he has appended to section 2624, in his edition of the Code, says: "This section has been taken from L. 1870, chap. 359, section 11, which confers such a power upon the surrogate of the city and county of New York. It has been so formed as to confine its application to a strictly domestic will, . . . and to a will of personal property. . . . *As thus amended*, the provision has been extended to all surrogate's courts."

[⁶] So far as this note throws any light upon the intention of the codifiers, it pretty plainly indicates that it was not their purpose to alter or vary the meaning of the act of 1870 in any other particulars than such as Mr. Throop has specified.

The inferences that may fairly be drawn from this comparison of the earlier and later enactments are very clearly set forth by Maxwell in his treatise on Interpretation of Statutes, 2 ed. p. 95. He says:

"Before adopting any proposed construction of a passage susceptible of more than one meaning, it is important to consider the effects or consequences which would result from it, for they often point out the genuine meaning of the words. There are certain objects which the legislature is presumed not to intend, and a construction which would lead to any of them is therefore to be avoided. It is sometimes found necessary to depart, not only from the primary and literal meaning of the words, but also from the rules of grammatical construction, when it is improbable

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that they express the real intention of the legislature, it being more reasonable to hold that the legislature expressed its intention in a slovenly manner than that it intended something which it is presumed not to ['] intend. One of these presumptions is that the legislature does not intend to make any alteration in the law beyond what it explicitly declares, either by express terms or by unmistakable implication—or, in other words, beyond the immediate scope and object of the statute. In all general matters beyond, the law remains undisturbed. *It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights or depart from the general system of law* without expressing its intention with irresistible clearness, and to give any such effect to general words, simply because in their widest and perhaps natural sense they have that meaning, would be to give them a meaning in which they were not really used. It is, therefore, an established rule of construction that general words and phrases, however wide and comprehensive in their literal sense, must be construed as strictly limited to the immediate object of the act, and as not altering the general principles of the law."

The learned commentator has grouped (pp. 96 to 114) a multitude of cases in which this doctrine has been asseverated and applied.

['] Bearing in mind these principles of interpretation, the act of 1870, and the substitution in its place of section 2624 of the Code, can it justly be said that such substitution was intended to work, or has in fact worked any change in the policy of the law as regards the persons who may invoke and the occasions for invoking the surrogate's jurisdiction to construe wills and pass upon their effect and validity at the time of admitting them to probate?

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I feel warranted by the authority of the cases collected by Sir Peter Maxwell in holding :

['] 1st. That no person can command the exercise of such jurisdiction, unless under the will whose provisions he seeks to have interpreted, he claims some interest in the personal estate bequeathed, or unless, on the other hand, he claims that because of the invalidity of the testator's disposition of such personalty, or of some portion thereof, he is entitled to share in the same under the statute of distributions ; and

["] 2d. That an occasion does not arise for the exercise by the surrogate of the power conferred by section 2624 unless, in accordance with the course and practice of the supreme court, that tribunal would, under similar circumstances, exercise its jurisdiction.

Two questions remain to be considered :

Are these contestants, if the question of the validity of the power of appointment may now be raised, competent to raise it ?

Would the supreme court determine it in the present posture of affairs against the objection of persons interested ?

The testator left him surviving no ancestor, descendant, brother, sister, nephew or niece. He left as his next of kin two uncles, an aunt, and several cousins. But his wife survived him ; and, had he died intestate, would have been entitled to his entire personal estate (subd. 3, sec. 75, tit. 3, chap. VI, part 2, *Rev. Stat.* [3 *Banks*, 7th ed.] 2303).*

["] I am at a loss to understand, therefore, how the contestants have any interest in the determination of the validity of the power of appointment which they here seek to bring in question. If it is valid, and if it shall be exercised, that is the end of the matter ; if it

* 2 R. S. 96, § 75, subd. 3.

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is invalid, or if being valid, it shall not be exercised, then the decedent (in case his gift to his cousin's prospective male descendant shall also prove abortive) will be discovered to have made no effectual disposition of the *corpus* of his estate; and so far as regards the personalty, with which alone this court can ever be concerned under section 2624, that estate will be found to have vested at his death in his widow, subject to a possible divestment that never in fact occurred.

[¹²] Assuming, however, that this view is incorrect, and that the contestants have a contingent interest in the personal estate of the testator, I feel bound to deny their present application, as one which would not now be entertained and passed upon by the supreme court for the reasons urged by counsel for the executors (*Wead v. Cantwell*, 36 *Hun*, 528; *Ward v. Ward*, 16 *Abb. N. C.* 253).^{*} This conclusion is not at odds with *Lorillard v. Coster*, 5 *Paige*, 172, or with *Hawley v. James*, 5 *Paige*, 442. See the criticism upon these cases in *Cross v. De Valle*, 1 *Wall.* 5. It is in harmony with the latter case, and with *Davis v. Angel*, 8 *Jur. N. S.* 709; *S. C.*, 8 *Jur. N. S.* 1024; *Minot v. Taylor*, 129 *Mass.* 160; *Goddard v. Brown*, 12 *R. I.* 31; *Hampton v. Holman*, *L. R. Ch. Div.* 183; *Jackson v. Turnley*, 21 *Eng. L. & Eq.* 13; *Thelluson v. Woodford*, 4 *Ves.* 227, at pp. 309, 310, 328; *Lady Langdale v. Briggs*, 39 *Eng. L. & Eq.* 194, 214, 218; *Bailey v. Briggs*, 56 *N. Y.* 407.

Application denied.

^{*} In *Wead v. Cantwell*, it was held, among other things, that an action for the construction of a will could not be maintained on the ground of a doubt in respect to which the executor was not yet called upon to act and might never be, as in the case of a contingent gift and in *Ward v. Ward*, the court held that it would not pronounce in advance the legal consequences of an event which had not happened and might never occur.

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FROTHINGHAM AND ANOTHER v. THE BROADWAY & SEVENTH AVENUE RAILROAD COMPANY, ET AL.

SUPREME COURT, FIRST DEPARTMENT, NEW YORK COUNTY, SPECIAL TERM, JANUARY, 1886.

§§ 870, *et seq.*, 872.

Examination of party before trial—Production of books and papers by corporate defendant on—When shown to be material and necessary—Stating grounds of belief in affidavit—Need not state cause of action—Action by stockholder of corporation to recover corporate property misappropriated—When may be brought without first requesting directors to sue—Instance of case in which stockholder had right to sue.

Where, in an action against a corporation, an examination before trial of its officers as such is ordered, the production of its books and papers on the examination may be required. As the corporation can only be examined through its officers, an objection that the order directed an examination of the officers and not of the corporation, and that, therefore, the production of its books cannot be compelled, is entirely technical and not at all in harmony with either the language or spirit of the provisions of the Code of Civil Procedure, authorizing an examination before trial.^[1]

Where the affidavit on which an order for the examination of the defendants in an action to enable the plaintiffs to frame their complaint, alleged that the plaintiffs were ignorant of all the details in reference to the transactions complained of, and of the particular share and interest therein taken by each of the defendants, and these facts were necessary to a proper statement of the cause of action foreshadowed in the affidavit,—*Held*, that the affidavit sufficiently showed that an examination of the defendants and their books was necessary;^[2, 6] also *Held*, that where the affidavit states that such information cannot be procured in any other manner, and there is no reason to suppose that it can be, that fact is sufficiently shown.^[6]

The fact that the purpose of an examination before trial is to procure

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evidence of fraud on the part of the defendants who are to be examined, forms no ground for the refusal of the order.^[3]

The fact that the affiant, in an affidavit on which an order for the examination of a party before trial was granted, fails to state the grounds of his belief, affords no ground for denying jurisdiction in a judge to issue the order.^[4]

Glenney v. Steadwell (64 N. Y. 120), followed.^[4]

It is not necessary that the affidavit on which an order for the examination of a party before trial is issued should state a complete cause of action; it is sufficient if the nature of the action is stated and the substance of the judgment demanded.^[5]

A stockholder of a corporation is not precluded from bringing an action against its trustees and others, to charge them with the misappropriation of property and funds of the corporation, by the fact that the stock held by him was transferred to him after the commission of the acts complained of.^[6 7]

Young v. Drake (8 Hun, 61), followed.^[8]

It is not necessary in such an action to show an active effort on the part of the plaintiff to secure remedial action on the part of the corporation, if it is apparent that such effort would have been of no avail;^[9] where the directors of the corporation participated in the acts complained of, it is apparent that a request to bring the action would be of no avail.^[11]

Barr v. N. Y., Lake Erie & Western R. R. Co. (96 N. Y. 444), followed.^[10]

Where, in an action by certain stockholders of the Seventh Avenue Railroad Company, a railway corporation, to charge the defendants with the misappropriation of the proceeds of certain bonds of the Broadway Surface Railroad Company, another railway corporation, it was alleged that the president of the Seventh Avenue Railroad Company held stock of the Broadway Railroad Company, in trust for the said Seventh Avenue Railroad Company, and that the bonds had been sold and their proceeds unaccounted for to the Broadway Surface Railroad Company, and it was apparent that said president of the Seventh Avenue Railroad Company would not bring an action to redress this wrong,—*Held*, that the plaintiffs had a right to sue;^[12] that an objection that the Seventh Avenue Railroad Company could not hold stock of another corporation was not well taken,^[13] it being alleged that the stock was a gift to the Seventh Avenue Railroad Company;^[14] that even if the stock was not a gift, but the transfer of it to the Seventh Avenue Railroad Company, was made in pursuance of a contract between the parties, which

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that company had performed, the defendants could not plead *ultra vires*.^[15]

(Decided January 24, 1886.)

Motion to vacate order to examine defendants in order to enable plaintiffs to frame their complaint.

The facts are fully stated in the opinion.

Joseph H. Choate and *William G. Choate* (*Alexander & Green*), attorneys, for defendants and motion.

Robert Sewell, *Elihu Root*, and *G. P. Hawes* (*Root & Strong*), attorneys, for plaintiffs, opposed.

VAN BRUNT, J.—The affidavit upon which the order in question was granted, alleges that the plaintiffs are copartners, and are stockholders of the corporation defendant, called the Broadway and Seventh Ave. R. R. Co.; sets forth route of the company; its capital stock; that it has been a profitable investment; that certain of the defendants are directors, president and secretary of said company.

The affidavit further alleges, that since the incorporation of said Seventh Ave. R. R. Co., it has been its aim and endeavor to acquire a franchise for maintaining a railroad upon the surface of the street, from Fourteenth street, down Broadway to the Battery; that in May, 1884, the legislature of the State of New York passed a law which has since been known as the "Street Surface R. R. Act;"* that immediately upon the passage of the act, the Seventh Ave. R. R. Co., and the individual defendants forming its directors and officers, caused to be made and filed a certificate of incorporation, whereby they became incorporated under the name of the "Broadway Surface R. R. Co.;" that said corporation was formed entirely in the inter-

* *Laws of 1884*, chap. 252.

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est of said Seventh Avenue Company, and its directors.

The affidavit further alleges, that certain other of the defendants are the directors, president, treasurer and secretary of said Broadway R. R. Company, and that said company has a nominal capital of \$1,000,000; that the directors of said Seventh Avenue Company, caused such proceedings to be taken, as resulted in said Broadway R. R. Company acquiring the right to build a railroad from Fourteenth street to Bowling Green; that after the building of said road, the Seventh Avenue Company furnished the equipment for the operations of the Broadway road.

The affidavit further alleges, that in answer to certain questions addressed to him by the stockholders, the president of the Seventh Avenue Company, announced that Mr. Jacob Sharp, to whom nine thousand, five hundred and twenty shares of the Broadway Company had been issued, had transferred said shares to him in trust, to be used for the benefit of the Seventh Avenue Company and its stockholders.

The affidavit further alleges, that the plaintiffs do not know, and have no means of ascertaining the agreements between the president of the Seventh Avenue Company and Mr. Sharp, and that the affiant believes that the Seventh Avenue Company is the real owner of said Broadway Company; that mortgages to the extent of \$2,500,000 have been executed by said Broadway Company upon its property, to secure certain bonds; that many of such bonds have been sold by persons having control of said Broadway Company, and the money received by them; that many of the bonds have been distributed among the defendants, and by them retained as sold; but when, where and for how much sold or distributed, the plaintiffs do not know and have no means of ascertaining; and that neither the bonds nor the moneys received

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therefor have been accounted for the Seventh Avenue Company.

The affidavit further alleges, that the entire railroad of the Broadway Company did not cost to exceed \$100,000, and that the entire rolling stock, horses and stable accommodation of said road, and the expenses of organization, &c., were paid by the Seventh Avenue Company out of the proceeds of an issue of \$500,000 of bonds, secured by a second mortgage upon the property of said Seventh Avenue Company, and that \$2,000,000 of the said \$2,500,000, were not expended for any lawful purposes, but have been expended illegally in some way, to the plaintiff unknown, but that as affiant is informed and believes, that each of the defendants knows what disposition has been made of some of the bonds.

The affidavit further alleges, that the plaintiffs do not know, and have no means of ascertaining what the contracts or agreement may have been between the defendants or any of them; but, that the plaintiffs believe that the real reason therefor was the illegal purpose of subjecting the property of the Broadway Company to a large and fraudulent indebtedness; that the acts of the individual defendants have given a good cause of action to the Seventh Avenue Company, against them, but, that said Seventh Avenue Company will not bring any action against the individual defendants, because said individual defendants have full and complete control of it, and will not use the name of the company for the purpose of bringing an action against themselves.

The affidavit then alleges the franchise of the Broadway Company to be very valuable, which has been illegally incumbered by the \$2,500,000 mortgage, to the damage of the Seventh Avenue Company; that the plaintiffs have commenced an action on behalf of themselves and all other stockholders similarly situated

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with them against the Seventh Avenue Company, and its managers and directors, and against the Broadway Company, and its managers and directors, to compel an accounting of said \$2,500,000 of bonds, and for the purpose of causing to be transferred said stock to the said Seventh Avenue Company.

The affidavit then alleges the names and residences of the various defendants, and that their testimony is material and necessary in order that the plaintiffs may know therefrom the particulars of the fact which will enable them to frame a complaint in this action; that the books and papers of both the defendants are necessary and they are in the custody of the officers of both the defendants.

The usual affidavit of merits is set forth, and the affiant swears to the good faith of the application.

The affidavits of the defendant read in support of the motion allege that the plaintiffs did not become stockholders of the Seventh Avenue Company until July 10, 1885, and that the \$2,500,000 of bonds were issued and sold by the Broadway Company prior to June 22, 1885, and that on June 22, 1885 and subsequent to the making of the mortgages and delivery and sale of bonds, the 9520 share, of the stock of the Broadway Company were transferred by Mr. Sharp to the president of the Seventh Avenue Company, and his successors in office upon the following trust, viz., to hold the same in the interest and for the benefit of the Seventh Avenue Company, or to assign and transfer the same to such persons or parties, and for such purposes as such president or his successor should decide to be for the interest of the Seventh Avenue Company, &c.; that no consideration whatever, was paid by the said Seventh Avenue Company, or any of the directors or stockholders to said Sharp for such transfer and delivery, which was stated by said Sharp to have

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been made solely for the benefit of said Seventh Avenue Company.

The affidavit then sets up an agreement between the Broadway Company and the Twenty-Third street Railway Company, and alleges that no more than five cars of the Broadway Surface Company can be run on their said road ; that the effect of these contracts has largely increased the shares of the said Seventh Avenue Company, and that the cars run over the University Place route have not paid expenses ; and that the plaintiffs have not made any demand upon Seventh Avenue Company to bring this or any similar action ; that the action is not brought in good faith, and that as the affiant is informed, and believes the fact to be, that the real instigators of this action are certain persons claiming to be the owners of stock of a certain alleged corporation called the Union Passenger Railway and Transfer Company of New York, and that their purpose of bringing this action, among others, is to attempt to force the Broadway Company and the Seventh Avenue Company to lease its road and transfer the use of its franchise to the said transfer company.

The affidavit further alleges, that the stock of the plaintiff, Mary Hastings, was transferred to her on July 2, 1885, and that the use of her stock and name is in pursuance of the purpose herein before stated.

The objections raised to the order which is attached to this motion are numerous.

Those directed to that part of the order which, it is claimed, authorizes an examination and inspection of the book of the corporations by the plaintiffs will not be considered, because it was conceded upon the argument, that no case for such an examination and inspection had been made out, nor is any such examination or inspection demanded.

The defendants objected, 1st, that as the parties

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sought to be examined are not the corporation, its books and papers cannot be compelled to be produced under subdivision 7 of section 872 of the Code ;

2d, that the affidavit is defective, in that it fails to state facts which show that the examination of persons and books is necessary ;

3d, that the affidavit is defective, because the only purpose of the examination is to procure evidence of fraud on part of the defendants who are to be examined ;

4th, that the affidavit is defective, because it fails to state the ground of belief in the allegations which are made on information and belief ;

5th, that the affidavit is defective, because the papers on which the application is made, do not affirmatively show, by a statement of facts on which the court can base a finding that the information desired cannot be procured in any other manner than by the discovery which is sought to be made ;

6th, that the affidavit is defective, because it does not disclose a bona fide case, but an attempt at a mere fishing expedition for which purpose a court will not sustain an examination.

7th, that it does not appear that the examination is both material and necessary ;

8th, that no cause of action is shown ;

9th, that these plaintiffs cannot bring this action, because it does not appear that they were stockholders at the time of the acts complained of ; and because it must be brought, if at all, by the corporation or corporations, and there is no reason alleged why the Seventh Avenue Company, if properly requested so to do, would not bring suit against the guilty parties, if any ;

10th, that this action cannot be maintained by these plaintiffs, because neither by the facts above referred to nor by any other allegations is it shown that the

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directors of said Seventh Avenue Company have any cause of action against any holders of said stocks or bonds, or the proceeds thereof; or that the said directors have not obtained for their company everything that was agreed to be given to it; or that in any negotiations concerning the organization, &c. of the Broadway Company, they did not procure as advantageous terms as were possible or proper;

11th, that the proposed suit cannot be brought at all by any one;

12th, that the proposed suit cannot be brought because it involves an improper joinder of causes of action; because no accounting can be had; because it asks for the transfer to the Seventh Avenue Company of stocks of the Broadway Company, which it cannot lawfully hold;

13th, that this application for an inspection and examination will not be granted, because it is not made in good faith; because plaintiffs do not need this examination for the purpose of framing their complaint.

[] The objection that as the parties sought to be examined are not the corporation, its books and papers cannot be produced, seems to be entirely technical and not at all in harmony with either the language or the spirit of subdivision 7 of section 872 of the Code.

It is true that the section uses the language "and if the parties sought to be examined is a corporation, the affidavit shall state," &c.; but it is evident that this language was not intended to be strictly construed; as the subsequent language of the section clearly recognizes the fact that a corporation cannot testify, but must speak through its officer and records; such language being "the affidavit shall state the names of the officers or directors thereof, or any of them whose testimony is necessary or material, or the books and

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papers as to the contents of which an inspection or examination is desired," which requirement is complied with in the affidavit of the plaintiffs herein.

The use of the words examination and inspection is equally infelicitous, as it is clear it was not the intention to, in any way, impair the force of sections 803, &c., relating to the discovery of books and papers.

The amendment of 1880 * was intended simply to supply a defect in the law as it then existed, in reference to the examination of parties before trial by which the officers and directors of defendant corporation might be examined and compelled to produce such books and papers of the corporation as would aid them in the giving of their testimony precisely the same as individuals theretofore were compelled to appear and testify.

['] The objection that the affidavit fails to state facts which show that the examination of persons and books is necessary, does not seem to be well taken, as it is distinctly alleged that the plaintiffs are ignorant of all the details in reference to the transactions complained of, and of the particular share and interest therein taken by each of the defendants; facts necessary to a proper statement of the cause of action foreshadowed in the affidavit.

['] The third ground of objection seems to have been overruled by a recent decision of the general term of this department, holding that the fact that the purpose of the examination is to procure evidence of fraud on part of the defendants who are to be examined, forms no ground for the refusal of the order.†

* Laws of 1880, chap. 536.

† See the following cases decided by the general term of the supreme court, first department. *Davis v. Fish* (March, 1885), 35 *Hun*, 430; *Mechanical Organette Co. v. Hayes* (Oct. 1884), 19 *N. Y. Week. Dig.* 535; *Davenport Glucose Co. v. Tausig* (May, 1884), 6 *N. Y. Civ. Pro.* 152; *Andrews v. Keene* (Oct. 1883), 4 *Id.* 330.

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['] That because the affiant fails to state grounds of belief in *Glenney v. Steadwell*, 64 *N. Y.* 120, and many other cases have been held to afford no ground for denying jurisdiction in a judge to issue an order.

['] The objection that the affidavit does not show that the information desired cannot be procured in any other manner does not seem to be well taken, as the affiant swears that it cannot be so secured, and there are no reasons to suppose that it can.

The affidavit, if true, discloses a state of facts resulting in a wrong, which should be redressed, and, as will be hereafter shown, in the righting of which the plaintiffs have an interest, and an examination in such a case cannot be a mere fishing expedition. The

examination is both material and necessary, ['] because, as appears by the affidavit, as has been before stated, the plaintiff is ignorant of the particular parts taken by the defendant in this transaction.

['] It is not necessary that the affidavit should state a complete cause of action, it is sufficient if the nature of the action is stated and the substance of the judgment demanded.

In the case at bar, the nature of the action is clearly foreshadowed, in that it seeks to charge the defendants, and each and every of them, with a misappropriation of some portion of the \$2,500,000 of bonds issued by the Broadway Company or the proceeds thereof.

['] The objection to the right of plaintiffs to bring this action because they were not stockholders at the time of the commission of the acts complained of has never been recognized by the courts of this State.

The rule adopted by the supreme court of the United States was established to prevent certain

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abuses but never has obtained in the courts of this State.

It would, indeed, be a great hardship if, a wrong having been committed against the stockholders of a company, that all power to redress that wrong should cease because of a transfer to an innocent holder of such stock. This would be reversing the rule that the transfer of property includes the ownership of all incidents thereto.

In the case of *Williams v. The Western Union Telegraph Company* (93 *N. Y.* 162), it was expressly found by the court below that the stock was bought for the purpose of bringing the suit. Yet, it was not held to be an answer to the plaintiff's complaint. It is not necessary to hold this proposition in this case, however, as it seems to me somewhat doubtful whether a court of equity should be compelled to entertain actions brought upon causes of action bought merely for the purpose of bringing suit.

['] In *Young v. Drake* (8 *Hun*, 61), the court says: "It is enough that the plaintiff was a stockholder when the action was brought. If he purchased his stock after the alleged fraud was committed that he did not condone the fraud. The plaintiff acquired all the rights of the person of whom he purchased."

["] It is held in the case of *Barr v. N. Y., Lake Erie and Western R. R. Co.* (96 *N. Y.* 444), that it is not necessary to show an active effort on part of the plaintiffs, with the body of the corporation affected to induce remedial action on its part if it is apparent that such effort would have been of no avail.

["] The allegations in the affidavits under consideration allege participation in these various acts by the directors of the Seventh Avenue Company and the directors of the Broadway Company, and if such is the fact it is apparent that a request to them to bring the action would have been of no avail.

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The next and most serious objection to the maintenance of the order rests upon the denial of the right of the plaintiff or any one else to maintain an action of such a nature as is set forth in the affidavit. The affidavit alleges a mortgage of the Seventh Avenue Company's property for the building and equipping of the Broadway road, a transfer of stock of the Broadway Company to the president of the Seventh Avenue Company and his successors in trust for said company, and a mortgage of the entire property of the Broadway Company, for \$2,500,000 for no ostensible or known purpose. These facts make this relation between the parties—it makes the president of the Seventh Avenue Railway Company a trustee holding stock of the Broadway Company in trust for the Seventh Avenue Company, of which latter company the plaintiffs are stockholders. The president of the Seventh Avenue Company is a trustee therefore of the plaintiffs and the other stockholders of the Seventh Avenue Company. If the \$2,500,000 mortgage has been issued, the bonds sold and the proceeds unaccounted for to the Broadway Company, this is a wrong done to the stockholders of said company, of which the plaintiffs' trustee is one. Facts being alleged [12] by which it is apparent that said trustees would not bring an action to redress this wrong, the right of the plaintiffs to sue is established.

[13] The objection that the Seventh Avenue Company cannot hold lawfully stock of the Broadway Company is not well taken. The prohibition of law is against a railroad company using any of its funds in the purchase of any stock in its own or any other corporation.* The transfer of the stock of the Broadway Company to the Seventh Avenue Company [14] would in no way violate this rule, as the defend-

* This prohibition is contained in section 8 of the General Railroad Act. *Laws of 1850*, chap. 140.

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ants allege the transfer of this stock was a gift to the Seventh Avenue Company. Even if this were not so, and such transfer was made in pursuance of a contract [""] between the parties, which had been performed by the Seventh Avenue Company, the defendants could not plead *ultra vires* (Whitney Arms Co. v. Barbour, 63 N. Y. 62).

The objection that this action is not brought in good faith, but for the purpose of compelling a transfer of rights, property and franchises to some transfer company, I fail to see the force of, as, if the acts and conduct of the defendants have been legal and in good faith, I cannot imagine how they can be forced to do anything detrimental to their supposed interests.

I have thus briefly attempted in the limited time allowed me to show that the plaintiffs have substantially complied with the statute in all its details. I may have overlooked some of the objections made by the defendants, but it seems to me that if the facts stated in the plaintiff's affidavit are true, that they have established a right to examine the defendants in order that they may have the proper parties before the court and may make in their complaint the necessary and detailed allegations pertinent to the cause of action, the nature of which is stated in the moving affidavit.

The motion must therefore be denied, with \$10 costs to abide the event.

Engle v. Fischer.

ENGLE, RESPONDENT, v. FISCHER, APPELLANT.

COURT OF APPEALS, JUNE, 1886.

§ 401.

Statute of limitation—When concealment within the State does not suspend its running.

Where a resident of Australia accepted a draft, and soon thereafter absconded and came to New York city, where he assumed and hid himself under a fictitious name, for the purpose of concealing himself from his creditors,—*Held*, that such concealment of his identity did not suspend the operation of the statute of limitations; [^{1, 2, 7}] that it could not be construed to be an absence from the State, [²] and his continuous presence in the State for six years, although unknown to his creditor, would defeat an action on the draft. [^{1, 2, 4, 7}]

Sleight v. Kane (1 *Johns. Cas.* 76); [⁵] *Poillon v. Lawrence* (77 *N. Y.* 208), [⁶] distinguished.

Cases in which the return or coming into for a brief period only was held not to set the statute running, distinguished. [⁴]

The statute of limitation is a benign statute in which the legislature has written all the exceptions which sound policy dictated to it, and its plain language cannot be perverted to remedy the hardship of a particular case. [³]

Eagle v. Fischer (6 *N. Y. Civ. Pro.* 307), reversed. [⁷]

(Decided June 1, 1886.)

Appeal by defendant from order of the general term of the superior court of the city of New York, reversing a judgment of the trial term of that court in favor of the defendant.

Reported below, 6 *N. Y. Civ. Pro.* 307.

The opinion states enough facts.

W. & S. W. Fullerton, for defendant-appellant.

B. Lewinson, for plaintiff-respondent.

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EARL, J.—This action was commenced against the defendant as acceptor of a bill of exchange, payable three months after date, drawn on May 1, 1873, at Vienna, Austria, for 3,600 gulden, equivalent in our money to \$1,512. The defense interposed is that the cause of action was barred by the statute of limitations.

['] The facts are these: The defendant resided in Austria, where he accepted the bill, and soon thereafter he absconded, and, in July, came to the city of New York, and there he has ever since resided. On reaching New York, for the purpose of concealing himself from his creditors, he assumed the name of Marcus L. Fischer, and thereafter bore that name and hid himself thereunder. The plaintiff discovered him in the city of New York in April, 1882, and there, at his store, demanded of him the payment of the draft, which was refused, and then, in the same month, this action was commenced.

While the plaintiff concedes that more than six years have elapsed from the time the cause of action accrued against the defendant, he claims the benefit of the exception contained in section 401 of the Code, which is as follows: "If, when the cause of action accrues against a person, he is without the State, the action may be commenced within the time limited therefor, after his return into the State. If, after a cause of action has accrued against a person, he departs from and resides without the State, or remains continuously absent therefrom for the space of one year or more, the time of his absence, is not a part of the time limited, for the commencement of the action."

This section does not aid the plaintiff, because the defendant was not without the State when the cause of action accrued, and he never thereafter departed from the State.

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['] While the defendant bore an assumed name, he was physically at all times within the State, and there was no hiding or concealment of his person, except as he assumed and bore the fictitious name. It passes my comprehension how, by any process of reasoning or metaphysics, such a person, continually present in the State for nearly ten years, can be said never to have come here, and to have been continually absent from the State.

It is quite probable that the defendant perpetrated a fraud upon the plaintiff by concealing his residence from him, and that the statute was resorted to by him to defeat a just claim. Yet, the statute must have its operation. Its plain language cannot be per-
['] verted to remedy the hardship of any particular case. It is a benign statute, and the legislature has written in it all the exceptions which sound policy dictated to it. It may frequently operate to defeat just claims and be used by dishonest debtors. A cause of action may be barred before it is known to the claimant. The debtor may purposely conceal it, and yet the bar of the statute must inexorably be applied. A debtor who has always resided in the State may abscond from his home and conceal himself within the State from his creditors, and yet no one will claim that such debtors are to be regarded as without the State, or that such concealment will defeat the running of the statute. The law gives a creditor six years continued presence of his debtor within the State after the cause of action accrued, and that period has been deemed ample to enable the creditor to find his debtor, and put the machinery of the law in force against him. It would lead to great inconvenience, and leave the Bench and Bar without any certain rule if, in every case where a debtor has resided and continuously been within this State for six years after a cause of action against him accrued, and the statute of

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limitations is interposed as a bar to an action to enforce the same, it could be a matter of inquiry and litigation upon disputed evidence whether the debtor, during any portion of the time, concealed himself fraudulently or otherwise, and whether the creditor used due diligence to find him.

['] There are some cases in which what is now the first clause of the section above quoted was under consideration, and it became necessary for the courts to determine what was a return or coming into the State so as to set the statute running, wherein it was decided that the return must be open and notorious, and under such circumstances that the creditor could, with reasonable diligence, find his debtor and serve him with process (*Little v. Blunt*, 16 *Pick.* 359; *Hill v. Bellows*, 15 *Vt.* 727; *Hysinger v. Bullzell*, 3 *Gill & J. [Md.]* 158; *Didier v. Davison*, 2 *Barb. Ch.* 477; *Ford v. Babcock*, 2 *Sand.* 518; *Cole v. Jessup*, 10 *N. Y.* 96; *Dorr v. Swartwout*, 1 *Blatch. [U. S.] C. C.* 179; 3 *Parsons on Con.* [6 ed.] 96). A debtor might return to the State clandestinely, for a few hours, in the night time or on Sunday, or he might be in the State on his progress through it; and a return of such a character which might be concealed from and unknown to the creditor, and which would afford him no opportunity, by the use of reasonable diligence, to serve his debtor with process, is held not to be a return to the State within the meaning of the statute. But it has never before this case, so far as I can discover, been decided that when the debtor was continuously in the State for more than six years after the cause of action accrued, he was deemed to have been without the State, and thus the running of the statute defeated because he concealed his abode, and thus the creditor was unable to discover him and serve him with process.

['] The case of *Sleight v. Kane* (1 *Johns. Cas.*

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76), is not an authority for the plaintiff. There the defendant was held to be without the State while he was in a place which had been conquered and was held by the British troops, and which was neither *de facto* nor, I am inclined to believe, *de jure* a part of the State, nor subject to the jurisdiction of the State courts.

[*] In *Poillon v. Lawrence* (77 N. Y. 208), it was held that a discharge in bankruptcy was void as to a creditor from whom notice of the bankruptcy proceedings was purposely and fraudulently omitted by conducting the same in a name assumed by the debtor, which was entirely different from that under which the debt was contracted ; and that case has no bearing upon this.

[] We are constrained to hold that the order of the general term should be reversed, and the judgment of the trial term affirmed, with costs.

All concur.

CROSLEY v. COBB.

SUPREME COURT, FOURTH DEPARTMENT, ONONDAGA COUNTY, SPECIAL TERM, MAY, 1885.

§ 3234.

Costs—When both plaintiff and defendant not entitled to.

To entitle a defendant to costs under section 3234 of the Code of Civil Procedure, which provides that in certain actions wherein the complaint sets forth separately two or more causes of action, upon which issues of fact are joined, if the plaintiff recovers on one or more of the issues, and the defendant upon the other or others, each party is entitled to costs against the adverse party, etc., the defendant must recover a verdict, and a dismissal of the complaint as to

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one or more of the causes of action, or an exclusion of evidence in support thereof will not entitle him to costs. [¹, ², ⁵, ⁶, ⁸]

Where a complaint set up a cause of action for libel, and also contained three additional counts, setting out certain oral slander claimed to have been uttered by the defendant of and concerning the plaintiff, and the court on the trial held that two of the counts alleging slander did not state a cause of action, and excluded evidence as to them, and some portions of the publication set out in the first cause of action were withdrawn by the plaintiff, and as to others, the court holding they were not libelous, refused to hear evidence, and the plaintiff had a general verdict in his favor for \$50.—*Held*, that the rulings of the court excluding evidence was not such a recovery by the defendant as would entitle him to costs against the plaintiff. [¹, ², ⁵]

Briggs v. Allen (4 *Hill*, 538); [⁵] *Cooper v. Jolly* (30 *Hun*, 224), [⁶] followed. *Blashfield v. Blashfield* (unreported), [¹] distinguished.

Section 3234 of the Code of Civil Procedure, allowing costs both to the plaintiff and the defendant in certain actions where both recover, is substantially the same as the provisions of the Revised Statutes (2 *R. S.* 616, § 26, subd. 2); [¹] and the construction given to the latter is applicable to and furnishes a safe guide for that to be given to the Code. [⁴]

(*Decided May*, 1886.)

Motion by plaintiff for a new taxation of a bill of costs adjusted in favor of the defendant by the clerk of the county of Cortland.

A. P. Smith, for plaintiff and motion.

Frank Pierce, for defendant, opposed.

KENNEDY, J.—I do not think the plaintiff guilty of laches which should prevent his being heard on this application.

In August, 1884, the plaintiff brought this action to recover damages claimed to have been sustained by him by reason of a certain alleged libel printed and published by the defendant of and concerning the plaintiff. The complaint also contained three additional counts or divisions wherein certain oral slanders

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were claimed to have been uttered by the defendant of and concerning the plaintiff. To this complaint the defendant interposed an answer in which he admitted the authorship of the paper set out in said complaint, denominated a "poem" and the publication thereof; and he picks out certain stanzas or portions of this classical production and claims and avers that as to those, certain facts and incidents in the life of the plaintiff, justified the defendant in the creation of and the giving to the world the rare production referred to.

The answer also sets up certain facts and circumstances connected with the plaintiff's life, in mitigation of damages occasioned the plaintiff by the utterance of the defendant set forth in the third count of the complaint.

The cause was tried at the February circuit, 1885, in Cortland county, and a verdict rendered for the defendant. Judge MURRAY holding that court set same aside upon his minutes on plaintiff's motion. A second trial was had at a circuit held in Cortland in February, 1886, when the plaintiff recovered a general verdict for \$50.

From the affidavits and papers presented on this motion, it appears that when the cause was moved for trial, the defendant claimed and insisted to the court that that part of the second count or cause of action alleged to be slanderous which reads "the defendant said of and concerning the plaintiff. There is one thing he, plaintiff, did do, he made his mother swear to a lie," was not slanderous *per se*, and that no action could be maintained against defendant for this utterance by him, and thereupon the court so held. This disposed of the entire count. The defendant on said trial insisted that the third count or cause of action set up in said complaint did not state facts sufficient to constitute a cause of action, and the court so ruled.

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The cause proceeded to trial upon the complaint from which the said superfluous matter had been eliminated as above, and resulted as before stated in a general verdict for the plaintiff.

The defendant thereupon claimed that he was entitled to costs under section 3234 of the Code, and the clerk taxed a full bill in his favor amounting to \$779.32. This section provides: "In an action specified in section 3228 of the act, wherein the complaint sets forth separately two or more causes of action, upon which issues of fact are joined, if the plaintiff recovers on one or more of the issues, and the defendant upon the other or others, each party is entitled to costs against the adverse party, unless it is certified that the substantial cause of action was the same upon each issue; in which case, the plaintiff is only entitled to costs."

As to the count in said complaint charging a libel, the production charged to have been libelous is an entire article, and is for the purpose of this motion to be read as such. No issue of fact is joined in relation thereto, the defendant admits, doubtless with a considerable feeling of pride that he was its author and publisher, but he says that some expressions used in the production were justified because they related to certain things the plaintiff had at some time done, or with which he had been connected, and as to these he insisted that some were true and others he had reason to believe were true. Some portions of the effusion the court held were not libelous, and as to these it refused to hear evidence. As to other portions of the work some were withdrawn by the plaintiff, and evidence was received and submitted to the jury as to other portions, and the plaintiff had a verdict.

['] This is no more a recovery by the defendant upon an issue than it would be where the action is for slanderous words uttered, and different utterances

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are alleged, but upon the trial the plaintiff failed to prove all of them.

The third count or division of the complaint was held defective in that, it did not state facts sufficient to constitute a cause of action, and therefore the court ruled that no proof could be given under it.

[²] This ruling did not bring the case within the provisions of section 3234 above cited, since no issue of fact was or could be joined on it. No cause of action being alleged no issue could be made or presented for trial, and no recovery by either party could be had thereon.

[³] The provisions of the Code are substantially those of the Revised Statutes (2 R. S. 616, § 26, subd. 2), the former using the word "*recover*" and the latter "*found*."

[⁴] These words as used must, I think, be regarded as synonymous, and that the construction given to the revised statutes is applicable to and furnishes a safe guide for that to be given the Code.

[⁵] In *Briggs v. Allen* (4 Hill, 538), which was an action for libel, the declaration contained five counts. On the trial the plaintiff waived all claims for damages on account of the third count. The plaintiff obtained a general verdict. An application was made by defendant for costs. The court, NELSON, Ch. J., says: "The case is not within the statute; the provision contemplates a verdict for the defendant on the separate count before he is entitled to costs against the plaintiff. Independent of this section the only consequence of a *nolle prosequi* as to one count or part of a count in a declaration, is to deprive the plaintiff of costs upon the matter thus discontinued" (*People v. Fecter*, 12 Wend. 480; *Bull v. Ketchum*, 2 Denio, 190).

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[*] In *Cooper v. Jolly* (30 *Hun*, 224);* where the action was brought to recover penalties for a violation of the statute to prevent the adulteration of milk, the complaint contained twenty-three separate counts. The answer was a general denial. On the trial the plaintiff gave evidence tending to establish thirteen causes of action, but recovered a verdict on two counts alone for two penalties of \$50 each. The defendant claimed that he was entitled to costs under section 3234. *Held*, that the claim was not well founded, as the defendant had not recovered upon any of the issues within the meaning of said section. See *Barlow v. Barlow* (35 *Hun*, 50); *Willard v. Strachan* (3 *N. Y. Civ. Pro.* 452).

[†] The case of *Blashfield v. Blashfield* decided by Mr. Justice MARTIN, at special term, not reported, differs from the one in hand. There the action was upon two promissory notes, the complaint contained two counts one on each note, the answer interposed the statute of limitations as a defense.

The issue so formed was tried at the circuit, and after the evidence had been given upon defendant's motion the court held, as matter of law, that the defense had prevailed as to one note, and in substance directed that as to that the complaint be dismissed. On the application by defendant for costs, it was held that there were two causes of action set forth in the complaint upon which issue of fact had been joined, and that upon the trial the defendant, in effect, recovered on one of them, and was, therefore, entitled to costs.

[‡] In this case, I think the defendant did not recover upon any issue of fact joined by the pleadings within the meaning of section 3234, and an order

* Affirmed without opinion, 96 *N. Y.* 667. The general term decision here cited, reversed S. C., 3 *N. Y. Civ. Pro.* 9.

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will be entered disallowing costs to him, setting aside the taxation thereof by the clerk, and striking the same out of the judgment-roll if judgment has been entered in the action, without costs of this motion.

RUNDLE v. VAN INWEGAN, AS EXECUTOR, ETC.,
ET AL.

SUPREME COURT, SECOND DEPARTMENT, ORANGE
COUNTY, SPECIAL TERM, APRIL, 1886.

§§ 1760, 1768.

*Jurisdiction—When personal service of process necessary to—Domicile—
When wife's and husband's different—Void judgment of divorce
not render binding by acquiescence therein—Dower—Right
of widow to, how effected by her adultery.*

The rule is now well established that a wife may acquire a domicile separate from that of her husband whenever it is necessary for her to do so, and when husband and wife have separated and agreed to live apart, the wife's domicile cannot be drawn to that of her husband without her consent or without her actual presence at the place of the husband's residence.^[1]

Judgments of the courts of other States rendered against parties not residents of such States, and without personal service of process upon them within the borders of such States, have uniformly been held in this State, to be absolutely void,^[2, 3] and this rule applies although such parties are not residents of this State. []

Borden v. Fitch (15 Johns. 121);^[2] OD'ea v. O'Dea (3 East. Rep. 447);
^[4] People v. Baker (76 N. Y. 78);^[5] Doughty v. Doughty (28 N. J. Eq. 581);^[6] followed.

Kinnier v. Kinnier (45 N. Y. 535), distinguished.^[3]

Where a wife residing in New Jersey was not personally served with the process, in an action for divorce brought against her by her husband in Indiana, and did not appear therein, and judgment was rendered therein against her by default,—*Held*, that the judgment

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was absolutely void;[⁸] and that she was not estopped from denying its validity by her acquiescence therein and subsequent marriage during the life of her first husband.[^{9, 10, 11}]

Marriage is a status, in the maintenance of which the State has an interest; it can be dissolved only according to the laws of the State where the parties reside, and cannot be put on or off at the pleasure of the parties.[¹⁰]

In this State, adultery on the part of a wife will not bar her dower in her husband's estate unless she be convicted of that offense by a decree of the court,[¹²] and although the wife resided and committed the offense in New Jersey, the statute of that State which declares that a wife who leaves her husband and dwells with her adulterer is barred of dower can have no force or effect in an action for dower in this State.[¹²]

(Decided April, 1886.)

Trial of action for admeasurement of dower at special term.

The opinion states the facts.

T. J. & J. W. Lyon, for plaintiff.

O. P. Howell & Lewis E. Carr, for defendants.

BROWN, J.—The decision of this case turns upon the question whether the judgment of the Indiana court in the action by Samuel Bevans against the plaintiff was effectual to dissolve the marriage between those parties. There is no dispute in the facts. The evidence warrants the conclusion that when the parties separated in October, 1865, and Samuel Bevans left the State of New Jersey, he did so with the intention of never again taking up his residence in that State.

He never did return there. His domicile at the time of the commencement of the action for divorce was not in New Jersey. I assume it to have been in Indiana, but it was acquired there without doubt for the purpose of procuring a divorce in the courts of that State. There is nothing in the testimony from which it can

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be inferred that the plaintiff knew of this intention at the time Bevans left New Jersey, but I shall find that she was informed of the commencement and of the pendency of the action against her, and stated that she should make no opposition to it.

No process was ever served upon her, and the court of Indiana never acquired jurisdiction over her.

In determining the validity of the Indiana judgment, therefore, I assume Bevans to have been a citizen of Indiana and the plaintiff a citizen of New Jersey. I am unable to give my assent to the proposition that the plaintiff's domicile must be deemed the domicile of her husband.

[¹] The rule is now well established that a wife may acquire a domicile separate from that of her husband whenever it is necessary for her to do so, and when husband and wife have separated and agreed to live apart, the wife's domicile cannot be drawn to that of her husband without her consent or without her actual presence at the place of the husband's residence. The plaintiff then must be regarded as a resident of New Jersey at the date of the judgment of the Indiana court, and she has remained such to the present time.

[²] It would be useless at this day to cite authorities to show the effect which the courts of this State have given to judgments of other States rendered against parties not residents of such States, and without personal service of process upon them within the borders of such States.

The decisions are uniform, that such judgments are absolutely void.

It is true, in nearly all of the reported decisions, the persons against whom such judgments have been rendered have been citizens of this State, but in at least three cases the effect of such judgments upon citizens of other States has been considered.

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['] In *Borden v. Fitch* (15 *Johns.* 121), one of the earliest cases on this subject, and one which is cited and approved in about every subsequent decision, the judgment considered by the court was one obtained in Vermont against a citizen of Connecticut. It was held, that the judgment was void, and the person to whom the defendant had been married in this State was permitted to testify against him on the ground that she was not his wife, for the reason that the judgment of the Vermont court was ineffectual to dissolve the marriage between defendant and his first wife.

['] In *O'Dea v. O'Dea*, the last case of this kind before the court of appeals, reported in 3 *East. Rep.* 447, the judgment considered was rendered by the Ohio court against a citizen of Canada. It was held to be absolutely void. This was an extreme case, and shows how tenaciously the court of appeals have clung to the doctrine that when the court rendering the judgment had not jurisdiction over the person of the defendant, the judgment is void. The dissenting opinion of Judge DANFORTH, reported in 3 *How. Pr. N. S.* 271, discussed some of the propositions urged upon me by the defendant's counsel, but as the result shows, they failed to receive the approval of the majority of the court. In the *O'Dea* case, the defendant had actual notice of the Ohio suit, and appeared before a commissioner in Canada, who had been appointed by the Ohio court to take testimony in the case; but such notice and such appearance was held to be ineffectual to give the Ohio court jurisdiction over her person.

['] In *Kinnier v. Kinnier* (45 *N. Y.* 535), the parties to the suit were residents of Massachusetts; the judgment of the Illinois court was sustained in that action for the reason that both parties had appeared personally in the suit, and, therefore, the court had jurisdiction of both the subject matter and of the persons

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of the parties. The judgment of the court of appeals was placed solely upon that ground, and it is very clear that had the fact been, as it is here, that process had not been served on the defendant, and had there been no appearance on her part, the decision would have been the other way.

[⁹] It is not disputed in any of these cases, but that every State may adjudge the status of its own citizens towards non-residents, and to that end may authorize such judicial proceedings as it sees fit ; but as said by Judge FOLGER in *People v. Baker* (76 *N. Y.* 84), "the operation of such judgments must be kept within the confines of the States in which they are rendered." At page 84 he says, "that judgment cannot push its effect over the borders of another State, to the subversion of its laws and the defeat of its policy ; nor seek across its bounds the person of one of its citizens, and fix upon her a status against her will, and without her consent and in hostility to the laws of the sovereignty of her allegiance." Again, at page 87 of the same case, he says : "We are not satisfied with the doctrine that vests the validity of such judicial proceedings upon the right and sovereign powers of a State to determine the status of its own citizens, and, because it may not otherwise effectually establish it, asserts the power to adjudge upon important rights, without hearing the party to be affected, and without giving him the notice which is required by the principles of natural justice, he being all the while beyond its jurisdiction." Such is the settled law of this

[⁷] State. Effect will not be given to a personal judgment recovered in another State unless the court rendering the judgment has acquired jurisdiction over the person of the defendant, either by the service of process within the boundaries of the foreign State, or by the voluntary appearance of the defendant in the action. The provision of the constitution of the

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United States which requires as full effect to be given to judicial decrees of other States as is given to them in the State in which they are rendered is confined in its operation to judgments in which the courts rendering them had jurisdiction over the defendants.

The law of the State of the plaintiff's residence appears to be the same, and the decisions of the New Jersey courts are to the same effect as those cited from the courts of this State.

[¹] Doughty v. Doughty (28 *N. J. Eq.* 581), is the latest declaration of the law on this subject by the court of chancery of New Jersey. That was an action for divorce by the wife against the husband. The defense was a judgment of divorce in favor of the husband against the wife by the courts of Illinois. The parties had married in New Jersey and they had separated, the husband going to Illinois, the wife remaining in New Jersey. No notice of the Illinois suit was ever served upon the wife, and she was never within the jurisdiction of the Illinois court.

The Illinois divorce was held to be absolutely void, and the principle stated "that a decree of divorce will have no extra-territorial effect when the defendant is domiciled in another State, and is not served with process nor with notice of the proceedings." I am of the opinion, therefore, that the courts of New Jersey would give no effect to the divorce obtained by Bevans in Indiana.

It is claimed, however, that the plaintiff acquiesced in the Indiana decision, and is now estopped from denying its effect upon her.

[²] It appears that the plaintiff did, in 1874, contract another marriage in New Jersey; that before doing so she procured a copy of the judgment in the divorce suit, and with her father consulted counsel as to its effect, and that, after so doing, was publicly married at her father's residence; and the testimony of

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the clergyman who performed the ceremony leaves no doubt on my mind, that he was informed by the plaintiff's father and brother that she was divorced from Bevans, and that there was no obstacle in the way of her marriage to the man whose name she now bears.

With the moral phase of this case the court has no power to deal.

I should be glad to reach a different conclusion from the one I am compelled to adopt. The effect of the judgment upon the child of the plaintiff is of more importance than any other result of this action. The plaintiff's conduct is reprehensible in the extreme, and exhibits, in her willingness to expose to the world her own crimes and her offspring's illegitimacy for the paltry sum to be recovered in this action, an utter lack of affection, and an absence of all sense of natural justice.

I have no discretion, however, in deciding this case. Plaintiff asserts a legal right, and if the judgment of the Indiana court was not effectual to dissolve the marriage between her and Bevans, she is now his widow and entitled to her dower in the real estate of which he died seized.

[*] The marriage relation is not one which the parties can put on or off at their own pleasure. Marriage is a status. The State has an interest in its maintenance, and it can be dissolved only according to the laws of the State where the parties reside. I know of no principle of law which permits a person not before the court to acquiesce in a judgment dissolving a marriage. Certainly if such was the law, the cases of *People v. Baker*, and *O'Dea v. O'Dea*, above cited, would have been differently decided. In both cases the defendants had re-married on the faith of the foreign divorce, and each invoked the foreign judg-

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ment in their defense. In both cases the defense was overruled.

In the case of *Doughty v. Doughty*, above cited, it is intimated that if jurisdiction of the person in an action for divorce is obtained in a manner consistent with natural justice, that a judgment rendered in such an action will be given effect in other States, on the ground of comity. What kind of notice would be regarded as consistent with natural justice is not stated. In that case there was no notice at all, and therefore it was not necessary to discuss this proposition. There was no notice to the defendant in the case we are considering, and therefore it is impossible to distinguish this case from the *Doughty* case; but if it was intended to hold that actual notice or actual service of papers on the defendant would be regarded as a notice consistent with natural justice, it will be observed that such a doctrine is not consistent with the decisions of this State. In the *O'Dea* case, the defendant had actual notice, and Judge DANFORTH discusses that fact in his dissenting opinion, holding that such a notice was all that was required to be consistent with natural justice, but his view on this subject did not meet the approval of the majority of the court.

[1] It is sufficient to say here, however, that the proof in this case does not show any notice at all to the defendant, and therefore, under the authority of *Doughty v. Doughty* and all the cases in this State, the Indiana divorce is an absolute nullity, and I fail to see how, if the marriage relation existing between the plaintiff and Bevans was not severed by the decree of the Indiana court, anything that the plaintiff may have done since, however inconsistent it may be with her being the wife of Bevans, can affect that relation.

[2] The New Jersey statute which declares that a

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wife who leaves her husband and dwells with her adulterer is barred of dower, can have no force or effect in this State.

['] It is settled by numerous authorities in this State that adultery on the part of the wife will not bar her dower in her husband's estate unless she be convicted of that offense by a decree of the court.

My conclusion is that the plaintiff must have judgment, with costs.

BUCKLEY, INDIVIDUALLY, AND AS EXECUTOR, ETC.,
v. DRAKE, ET AL., AS COMMISSIONERS OF
HIGHWAYS OF THE TOWN OF
DEER PARK.

SUPREME COURT, SECOND DEPARTMENT, ORANGE
COUNTY, SPECIAL TERM, MARCH, 1886.

§§ 2139, 2140.

*Certiorari—Effect of Code of Civil Procedure on remedy by—When proceedings of highway commissioners should be reviewed by—
When equitable action not maintainable.*

An action in equity cannot be maintained if the plaintiff has a clear legal remedy,

The Code of Civil Procedure has very much enlarged the scope of proceedings by certiorari, and the writ now brings up not only all the facts which would appear on the face of the record, but other facts "essential to the jurisdiction of the body or officer to make the determination to be reviewed" may be shown by "affidavit or other written proof," and the court may determine upon the hearing, among other things, questions as to the jurisdiction of the body or officer on the subject matter of the determination under review, and whether, in making such determination, any rule of law affecting the rights of the parties thereto has been violated.

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It seems, that an applicant for a highway is not a proper juror to certify to the necessity therefor in a proceeding for the opening of a road.

An equitable action cannot be maintained to set aside the proceedings of highway commissioners for the opening of a road, on the ground that one of the applicants therefor was a juror in the proceeding; the remedy is by certiorari, and if the fact that the applicant and the juror were the same person does not clearly appear from the return, that fact can be shown by affidavit.

(Decided March 3, 1886.)

Action in equity to set aside proceedings of commissioners of highways for alleged error in allowing applicants to act as jurors to certify to necessity for road.

The opinion states sufficient other facts.

John W. Lyon, for plaintiff.

C. E. Cuddeback, for defendants.

BROWN, J.—Upon the merits of this case, as presented by the plaintiff's evidence, I think there was error in drawing a jury. Applicants for the highway were not proper jurors. A jury composed exclusively of those who petitioned for the road could hardly be said to form an unbiased tribunal, and the parties whose lands were to be taken were entitled to a jury, each of whom should be impartial.

I think, however, that this action cannot be maintained. That an action in equity cannot be maintained if the plaintiff has a clear legal remedy, is a proposition too well settled to need the citation of authorities.

The scope of proceedings by certiorari has been very much enlarged by the Code of Civil Procedure.

The writ now brings up, not only all the facts which

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would appear on the face of the record, but other facts "essential to the jurisdiction of the body or officer to make the determination to be reviewed" may be shown by "affidavits or other written proof" (*Code of Civil Procedure*, § 2139, last half of section).

Section 2140 states the questions that the court may determine upon the hearing. Among these are the jurisdiction of the body or officer on the subject matter of the determination under review, and whether in making such determination any rule of law affecting the rights of parties thereto has been violated.

In a proceeding by certiorari to the commissioners of highways it would have appeared that the names of the applicants for the road were deposited in the box by the town clerk, and that J. A. Fisher was drawn as one of the jury and served as a juror. And if the fact that the applicant and the juror was the same person did not appear clearly from the return, such identity could have been shown by affidavit.

The court, upon the hearing, could have had, therefore, plainly the same facts before it as have been proven by the plaintiff upon the trial of the case, and the same question would have been determined in that proceeding that it is sought to have determined here.

There was a perfect remedy provided at law, and this action cannot, therefore, be maintained.

The complaint is dismissed, with costs.*

* An appeal was taken from this determination to the general term, and argued at the May term, 1886, but has not yet been determined.

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DODGE, AND ANOTHER, v. JOHNSON.

SUPREME COURT, THIRD DEPARTMENT, GREENE
COUNTY, SPECIAL TERM, MAY, 1886.

§§ 481, 488.

*Complaint—When demand of judgment consistent with cause of action—
Effect of demand for more than plaintiff is entitled to—
Instance of complaint stating sufficient facts.*

Where a complaint alleged a sale of merchandise by the plaintiffs to the defendant; that the defendant had made and delivered to the plaintiffs three notes in part payment for such merchandise; that two of the notes had become due; that they had not been paid and had been protested for non-payment, and the plaintiffs had paid the expense of such protest; that the third note was not due when the action was brought; and demanded judgment for the price of the merchandise and protest fees, with interest on the amounts of the several notes from the dates of their maturity, and also on the balance of the original indebtedness after deducting the notes,—*Held*, that the relief demanded was consistent with the cause of action; that sufficient was alleged to show that the notes had not been negotiated or diverted by the plaintiffs, and the complaint stated facts sufficient to constitute a cause of action, but that the plaintiffs could not recover the amount of the third note, which was not due when the action was commenced; that acceptance of such note had the effect of extending the time of payment.

Williams v. McAllister (23 *N. Y. Week. Dig.* 97); *Edson v. Girvan* (29 *Hun*, 426), distinguished.

The fact that a plaintiff demands a larger sum in his complaint than he is entitled to, is not fatal to his right to recover.
(*Decided May 3, 1886.*)

Demurrer to complaint on the ground that it does not state facts sufficient to constitute a cause of action.

The action was brought for goods sold. The complaint alleged the sale of merchandise to amount of

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\$251.12. Then follows statement that the defendant executed, in part payment of the indebtedness, a note for \$29.33, which matured, went to protest, and the plaintiffs paid the protest fees for defendant, \$1.09; that afterward the defendant gave plaintiffs another note of \$75.16; to apply on said indebtedness, which, before the action was brought, matured and remains unpaid; that subsequently defendant gave plaintiffs another note of \$103.12, which was not due when the action was brought.

The complaint demanded judgment for \$251.12, and \$1.09 protest fees, and interest on the sums represented by the three notes from the date of maturity of each, and also interest on the balance of the original debt after deducting the several notes.

The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute cause of action.

James B. Almy, for plaintiffs.

F. H. Osborn, for defendant.

INGALLS, J.—I. The relief demanded is consistent with the cause of action.

II. It is not fatal to plaintiff's right of recovery that he demands a larger sum than he is entitled to.

III. The complaint alleges the execution and delivery by the defendant to the plaintiffs, of three promissory notes, and that two of them had become payable, and payment had not been made, and they had been protested for non-payment and the plaintiffs had paid the expenses of such protest. I think sufficient has been alleged in the complaint and admitted by the demurrer to show that the two notes had not been negotiated by plaintiffs or diverted by them. The third note was not payable when the action was com-

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menced, and consequently cannot be recovered in this action. Acceptance of such note had the effect to extend the time of payment (76 *N. Y.* 521).*

IV. This case is unlike the one cited from 23 *N. Y. Week. Dig.* 98,† because in that case the note had not matured and consequently there was no right of action. In this case the *two* notes had become due and payable.

V. Nor is this case within the principle decided in 29 *Hun*, 426,‡ as the relief in the case cited was inconsistent with that demanded in the complaint. The relief claimed was to recover the money due upon a note, and the court held substantially that such a demand for judgment would not justify an accounting. In the case under consideration the plaintiffs seek no judgment other than the complaint demands, nor in excess thereof, or more favorable to them than is claimed therein (*Code Civ. Pro.* § 1207).

The plaintiffs must have judgment for amount claimed, less the note which was not due when the action was commenced, and the interest thereon, with leave to defendant to withdraw demurrer and answer in twenty days on payment of costs of demurrer.

* Jagger Iron Co. v. Walker.

† Williams v. McAlister.

‡ Edson v. Girvan.

Joyce v. Spafard.

JOYCE, JUDGMENT CREDITOR, RESPONDENT, v. SPAFARD, JUDGMENT DEBTOR, APPELLANT.

SUPREME COURT, FOURTH DEPARTMENT, ONEIDA COUNTY, SPECIAL TERM, OCTOBER, 1885; GENERAL TERM, NOVEMBER, 1885.

§§ 2435, 2458.

Supplementary proceedings—Fact that execution was issued out of court of record, when sufficiently appears—Power of court to order debtor's appearance after return day named in order has passed.

Where the affidavit on which an order for the examination of a judgment debtor in proceedings supplementary to execution, stated that judgment was rendered and perfected in the supreme court, and "that an execution against the property" of the judgment debtor was "duly issued upon said judgment and delivered to the sheriff of the county of Oneida," etc.,—*Held*, that it sufficiently appeared that the execution was issued out of a court of record.^[1]

The court in which a judgment was recovered, and out of which an execution thereon was issued, has the power, upon vacating an order setting aside an order for the examination of the judgment debtor in supplementary proceedings which has been duly served, to direct the judgment debtor to appear for examination under the original order on a day named.^[3, 4]

The purpose of the provisions of the Code of Civil Procedure relating to supplementary proceedings is to furnish a simple and ready substitute for the old equity proceedings, in discovering and applying the property of a debtor which cannot otherwise be reached, to the payment of his debts.^[2]

(Decided at special term, October 10, 1885; at general term, November 10, 1885.)

Motion that an order of the special county judge of Oneida county vacating an order for the examination of the judgment debtor in proceedings supplemen-

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tary to execution be set aside, and that the proceedings be continued before the referee appointed therein with the same force and effect as if the order for her examination had not been vacated.

On August 11, 1885, the special county judge of Oneida county, granted an order in proceedings supplementary to execution, requiring the appellant, Elizabeth F. Spafard, to appear and be examined before a referee therein named, on August 14. On that day the appellant duly appeared by her attorney, and the examination was adjourned to August 19. On August 15, upon application by appellant. Judge EVANS granted an order to show cause, returnable before him August 19, why the order for examination of August 11 should not be vacated and set aside, "because the affidavit upon which the same was granted, did not state facts sufficient to confer jurisdiction."

The affidavit upon which the order for examination was granted, was entitled in the supreme court, and stated that "judgment was rendered and perfected in this action in favor of said plaintiff and against Elizabeth F. Spafard, the defendant above named in said action, in the supreme court of the State of New York, on May 13, 1885, for \$265.94 damages, and \$16.37 costs, upon the personal service of the summons upon said defendant, and the said judgment was docketed, and the judgment-roll therein filed in the office of the clerk of the county of Oneida, on said May 13, 1885; that an execution against the property of the said Elizabeth F. Spafard, was, on May 13, 1885, duly issued upon said judgment and delivered to the sheriff of the county of Oneida, where the said defendant then resided and yet resides, in the city of Utica, N. Y., and that the said sheriff has duly returned the said execution wholly unsatisfied; that such return was made within

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ten years; that the said judgment remains wholly unpaid and unsatisfied; that no previous application has been made for the order asked hereon," but did not state that the execution was issued out of the supreme court or that it was issued out of a court of record.

Upon the return day of the order to show cause, August 19, 1885, the motion was granted and an order entered vacating the order for the judgment debtor's examination.

On September 15, 1885, the judgment creditor gave notice of motion returnable September 26, 1885, "for an order vacating and setting aside said order granted by said special county judge," dated August 19, 1885, "and that said supplementary proceedings be continued before said referee under said original order granted August 11, 1885, by said special county judge, with the same force and effect as if the latter order had not been vacated and set aside, and for such further order or relief as may be proper to grant, with costs of this motion."

William E. Harter, for the judgment creditor and motion.

Frederick G. Fincke, for the judgment debtor, opposed.

KENNEDY, J.—It is not quite apparent upon what particular ground the special county judge vacated the order granted by him in supplementary proceedings by which a referee was appointed and the defendant, a judgment debtor, required to appear before him for examination. An examination of the affidavit upon which said order was based, together with the order, shows that each fully comply with the provisions of the statute in that regard.

The position of the defendant's counsel,—that it

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does not appear that the execution issued out of a court of record,—does not seem tenable. The statement in the affidavit is, that the plaintiff recovered a judgment in the supreme court of the state of New York, for more than \$25, to wit, some \$280 ; that the roll was filed and judgment docketed in the office of the clerk of Oneida county, May 13, 1885 ; that an execution on said judgment against the defendant's property was duly issued and delivered to the sheriff of Oneida county, in which county the defendant resided, ['] and that same was afterwards returned by him wholly unsatisfied. This seems to be a compliance with the requirements of the statute, and entitled the plaintiff to the order (*Code of Civil Procedure*, §§ 2435-2458).

The order of the special county judge, vacating and setting aside said original order for defendant's examination, is vacated and set aside, and an order to that effect is directed to be entered.

The plaintiff asks the additional relief on this motion, that the defendant, the judgment debtor, be required to appear before the referee named in and appointed by said order, on a day to be named, and submit to an examination. I am not aware that the power of this court, it being the one out of which the execution issued, under section 2433, subdivision 2, has ever been judicially determined.

An examination of the several provisions of the Code of Civil Procedure, relating to supplementary proceedings, shows that its purpose is to furnish ['] a simple and ready substitute for the old equity proceedings, in discovering and applying the property of a debtor which cannot otherwise be reached, to the payment of his debts. Following out this intent it is provided that when an order requiring the judgment debtor to attend and be examined, . . . has been served before the appointment of a receiver

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or the extension of the receivership, the receiver's title extends back so as to include the personal property of the judgment debtor at the time of the service of the order" (*Code*, § 2469, subd. 1).

If, upon the restoration of the original order for the debtor's examination, by the vacating of an order improperly made, setting the same aside, said original order becomes inoperative because the day fixed ['] for the examination has passed, then the creditor will, by the error of the judge, lose his lien upon the debtor's property at the time of the service of the order, and it may be assumed, in many cases, the benefit of his proceedings.

I am not willing to believe that this result is intended, and am disposed to hold that this court, in which the judgment was obtained and out of which ['] the execution issued, has the power, upon vacating an order made, setting aside an order which has been duly served on the debtor for his examination, thereby restoring it, to order the judgment debtor to appear for examination upon the original order before the referee, on a day to be named in the order, to the end that thereby the rights of the proceeding creditor may be protected.

An order may, therefore, be entered in addition to and coupled with the one above, providing that the defendant Elizabeth F. Spaford, the judgment debtor, appear before Daniel E. Bevines, Esq., the referee appointed by said original order, at a time to be inserted in the order, for examination, and that the proceedings be continued under said original order. If a day for such appearance and examination is not agreed upon by the respective parties, the form of the order and time for appearance will be settled and fixed by me on two days' notice.

The defendant to pay plaintiff \$10 costs of this motion.

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The judgment debtor appealed to the general term of the supreme court, fourth department, from that part of the order entered on this decision, which revived and continued the proceedings and required her to attend before the referee appointed by the order of August 11, 1885, and submit to an examination as to her property.

Fredrick G. Fincke, for judgment debtor, appellant.

William E. Harter, for judgment creditor, respondent.

PER CURIAM.—[HARDIN, P. J., and FOLLETT, J. (KENNEDY, J., not sitting.)]—Order affirmed with \$10 costs on the opinion of KENNEDY, J., delivered at special term.*

DIEHL v. LAMBART.

SUPREME COURT, FIRST DEPARTMENT, NEW YORK
COUNTY, SPECIAL TERM, MAY, 1886.

§ 544.

*Supplemental complaint—When may be served in action for partition—
Papers on motion for.*

Where, pending an action for partition and before its trial, one having a life estate in the property in question conveyed to the remaindermen her interest therein,—*Held*, that a motion by the plaintiff for leave to serve a supplemental complaint setting forth such transfer should be granted.

Where, on a motion for leave to serve a supplemental complaint, the

* From the order of affirmance entered on this determination an appeal was taken to the court of appeals by the judgment debtor, which was dismissed on the merits, without opinion, February, 1886.

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facts sought to be set up thereby fully appeared, but a copy of the proposed pleading was not served with the motion papers, the motion was nevertheless granted.

(Decided May 17, 1886.)

Motion by plaintiff for leave to serve a supplemental complaint.

This action was commenced October 17, 1885, to secure the partitioning of certain real property located in the city of New York. The amended complaint, which was served November 21, 1885, averred that one Philip Lambart had departed this life March 29, 1878, seized of the premises in question, and leaving a last will and testament which was thereafter duly admitted to probate, whereby he devised said premises to the defendant Margaret Lambart until her marriage or decease, and devised the reversion and remainder thereof after her marriage or decease to the plaintiff and the defendants Philip Lambart and Mary Eisele, to be equally divided among them. The defendant Christiana Lambart, who, being the wife of the defendant Philip Lambart, had an inchoate right of dower in his share of the property, demurred to the complaint, and her demurrer being overruled (*Vide 9 N. Y. Civ. Pro. 266*), answered over.

On April 24, 1886, Margaret Lambart executed and delivered a deed conveying to the plaintiff and the defendants Mary Eisele and Philip Lambart her life interest in the property. The plaintiff thereupon made this motion. The facts set forth above fully appeared in the motion papers, but a copy of the proposed supplemental complaint was not served therewith.

G. & M. Levy, for plaintiff and motion.

Whenever a plaintiff or defendant in any action becomes informed of certain facts material to his case

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which have occurred after service of complaint of which he was ignorant when his former pleading was made, he should apply to the court for leave to serve a supplemental pleading in which to present these newly discovered facts. Supplemental pleadings in such cases are not only allowable but indispensable, as such newly discovered facts cannot be inserted in the pleadings by amendment. An amendment to the pleading relates properly to the time when original pleading was made, and can only state facts in existence at that time. *Wait's Prac.* 467, 468, and cases there cited.

The scope of the supplemental pleading is to set up circumstances happening after the commencement of the action or after the original pleading was put in. *Hendricks v. Decker*, 35 *Barb.* 298; *Williams v. Hennon*, 16 *Abb. Pr.* 173; *Matthews v. Chicopee Man. Co.*, 3 *Robt.* 712. And they cannot be proved unless so set up. *Hall v. Olney*, 65 *Barb.* 27. The application for leave to file supplemental complaint granted almost as matter of course if made promptly and in a case within the terms of the Code. *Sage v. Mosher*, 17 *How. Pr.* 369; *Palmer v. Murray*, 18 *Id.* 545; 2 *Wait's Prac.* 469, 470. Ordinarily, where the facts show that a party is entitled to serve his supplemental pleading (as in the present case), he ought to be allowed so to do, unless the pleading is clearly bad or frivolous. *Mitchell v. Allen*, 25 *Hun*, 543. As a general rule, a plaintiff should be allowed, by a supplemental complaint, to set up new facts which are really part of the original matter, without the court being called upon on the motion to examine with care, whether the new facts constitute a cause of action. *Latham v. Richards*, 15 *Hun*, 129. Leave to file a supplemental pleading must be granted unless the motion papers show a case where the court may exercise a discretion in granting or refusing leave. *Spear v. Mayer*, 72 *N. Y.* 442. The merits of the action should not be tried on motion of

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this character, but left to the trial. *Deutsche National Bank v. Sonneborn*, 6 *N. Y. Week. Dig.* 153.

The motion for leave to file supplemental pleadings should be made on the pleadings in the action, and any affidavit showing when or at what stage of the action the matter sought to be set up in the pleading was discovered. The pleading should be exhibited to the court, that he may judge of its sufficiency and its consistency with the first pleadings. 2 *Wait's Prac.* 471.

D. M. Porter, for defendant, *Christiana Lambart*, opposed.

It is necessary that plaintiff serve an amended complaint with his motion papers, otherwise motion must be denied, with costs. *Stern v. Knapp*, 8 *N. Y. Civ. Pro.* 54; *Nightingale v. Continental Life Ins. Co.*, 2 *N. Y. Monthly Law Bul.* 15.

Plaintiff is not allowed to set up a cause of action acquired after the commencement of the action when she would be defeated without such after acquired cause of action. *Wattson v. Thibou*, 17 *Abb. Pr.* 184; *Tiffany v. Bowerman*, 2 *Hun*, 643; *Muller v. Earle*, 37 *N. Y. Super.* (5 *J. & S.*) 388.

That she might so be defeated, see opinion of *LAWRENCE, J.*, in this case on overruling demurrer of this defendant to complaint. 9 *N. Y. Civ. Pro.* 266.

ANDREWS, J.—Motion for leave to make, serve and file supplemental complaint granted.

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PRATT AND ANOTHER, RESPONDENTS, v.
MOSETTER, APPELLANT.SUPREME COURT, SECOND DEPARTMENT, GENERAL
TERM, MAY, 1886.

§ 1316.

Appeal—What intermediate order may be reviewed on, from final judgment—Order denying motion to send back commission for fuller execution is not such an order—When opinions not properly receivable in evidence.

An order denying a motion to send back a commission for fuller execution does not "necessarily affect the final judgment" within the meaning of section 1316 of the Code of Civil Procedure,—which provides that "an appeal taken from a final judgment, brings up for review . . . an intermediate order, which is specified in the notice of appeal, and necessarily affects the final judgment."^[1]

A motion to send back a commission for fuller execution is properly denied where all material questions were answered, and there has been great delay.^[2]

The duties of consignees cannot be established by the opinions of witnesses who are dealers in the articles sold;^[3] and although expert witnesses may state what the usage is, they cannot, even in a case where expert evidence is permitted, give an opinion as to the duties of consignees;^[4] the law which governs consignments would depend upon the facts.^[5]

All opinions cannot be given in evidence as that of an expert when the subject does not require any peculiar habit of study to qualify a man to understand it.^[6]

(Decided May, 1886.)

Appeal from a judgment in favor of the plaintiffs, entered upon the report of a referee, on which the defendant also sought to review an order of the special term denying a motion to return a commission issued on his behalf, for fuller execution; also motion by respondent to strike out of the notice of appeal, the

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reference to said order, and to dismiss the appeal therefrom.

The action was commenced January 5, 1883, by the plaintiffs, who were commission merchants in the city of New York, to recover balances due on advances made by them upon consignments of beef which they had shipped for the defendant. The complaint sets up three causes of action, as to the first and third of which there was practically no dispute. The second cause of action, as alleged in the complaint, is as follows :

“That between July 20, 1882, and October 20, 1882, the defendant made certain consignments of beef to the plaintiffs, amounting in all to fifteen hundred and nine tierces ; that at different times between July 20, 1882, and October 20, 1882, the plaintiff made certain advances to the defendant, on account of said consignments, amounting in all to \$34,906 ; that said consignments were shipped by the plaintiffs on receipt of same from defendant, with due care and diligence, to Liverpool, England, and upon their arrival there, the greater part of said consignments were found to be of an inferior grade to that which the brands called for ; that some of the tierces of said consignments were found to be badly tainted, owing to the carelessness, want of skill and unfaithfulness of the packer, the above named defendant, in preparing and packing the same ; that at various times the plaintiffs advised the defendants of the condition of said consignments, and on October 3, 1882, the defendant was advised of the value of the different grades of his beef on hand by the plaintiffs ; that the plaintiffs then and there offered to turn the said beef over to any person or broker whom he, the defendant, should authorize to receive the same, upon refunding the plaintiffs the advances made on the same, together with expenses incurred ;

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that on October 4, 1882, the plaintiffs again advised the defendant as to the condition of his said beef, and offered to reship to the defendant the tainted portion of the same, and the defendant then and there instructed plaintiffs to 'sell consignments on best terms; don't incur further expense reshipping;' that, acting under said instructions, the plaintiff sold said consignments in good faith, with due diligence and skill; that the net proceeds of the sales of all said consignments of beef were \$30,472.58, and were credited to the defendant on account of the advances made by the plaintiffs on account of said consignments, and left a balance or deficiency of \$4,433.42, for which the defendant is justly indebted to the plaintiffs; that although requested often, the defendant has not paid the said balance or any part thereof, but is justly indebted to the plaintiffs therefor."

The answer of the defendant alleged: "that he had formerly shipped his beef through Stevens & Co., of New York, and William Winsor, of Liverpool; that the plaintiff Pratt had been an employee of Stevens & Co., and after making a trip to England, formed the copartnership of Pratt & Illingworth, and thereafter solicited business of the defendant and made false representations to him as to his facilities, means, ability, and skill in business, whereby the defendant was induced to make consignments to the plaintiffs; that the beef delivered was worth at least \$12,000 in excess of the advances which the defendant had received, and that the failure to realize the said sum of \$12,000 above advances arose from the unskillfulness and neglect of the plaintiffs or their agents."

Pursuant to an order of this court, dated September 12, 1883, a commission was issued to examine certain witnesses in Liverpool, England, in behalf of the defendant, all legal objections to the interrogatories and cross-interrogatories being reserved to be

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taken on the trial; which commission was duly executed returned and opened January 30, 1884.

March 1, 1884, the defendant made a motion at special term of this court, to return such commission for a re-examination of one of the witnesses, which motion was denied by Mr. Justice CULLEN, by order dated March 10, 1884.

On March 12, 1884, said order was duly entered, and a certified copy and notice thereof were served upon the defendant's attorney on that day, but no appeal was taken therefrom within the time limited by statute.

On February 23, 1884, the action was referred to Hamilton Odell, Esq., to hear and to determine all the issues, and on the trial the commissions were read in evidence by the defendant.

Upon the report of said referee, on February 17, 1885, judgment was entered in favor of the plaintiffs herein for \$7,175.32.

On February 24, 1885, the defendant's attorney served plaintiffs' attorney with a notice of appeal from the judgment, and included therein a notice of appeal from the order denying defendant's motion to return his commission.

The plaintiff gave the defendant notice that he refused to receive such notice of appeal, except so far as it was an appeal from the judgment, and on January 30, 1886, served the defendant's attorney with notice of motion to be made at the general term on February 8, 1886, for an order correcting said notice of appeal by striking out that portion of same which professed to appeal from said order and dismissing the appeal thereon.

L. A. Gould, for defendant-appellant.

The appeal from the order should be sustained and considered in connection with the appeal from the

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judgment. No appeal from the order would have been necessary, but for the rulings of the referee in excluding testimony, and rendering judgment against the defendant. It is not consistent with justice that the defendant should not have a right, at his own expense, to have foreign commission properly executed, it not being claimed that he was guilty of laches, in applying for such return. *Wright v. Cabot*, 89 *N. Y.* 570; *Vilmar v. Schall*, 61 *Id.* 564; *Fassin v. Hubbard*, 55 *Id.* 465. . . .

“On questions of science, skill or trade, or others of the like kind, persons of skill, sometimes called experts, may not only testify to facts, but are permitted to give their opinions in evidence. So, too, as to the marketable condition and value of property, and many other questions where it is not practicable to give more definite knowledge, opinions are received.” 1 *Greenl. on Ev.* §§ 440, 440, *a.* . . . *Clark v. Baird*, 9 *N. Y.* 183, 194, 195, 196. . . . “Evidence of usage is admissible to explain either the language of the parties or the course of business in view of which they contracted so as to show what acts constitute performance. . . . Where the measure of defendant’s duty is ordinary care, the manner in which other persons in the same general business are accustomed to do is competent. Plaintiff may show the general course and usage of the business, so far as necessary, for the purpose of showing what ought to have been done in conducting the transaction in which the defendant is alleged to have been negligent.” *Abbott’s Trial Ev.* 573, 590; *Brown v. Hitchcock*, 28 *Vt.* 452. “A general usage may be proved by testimony of experts to decide a question of duty not governed by law.” *Barnard v. Kellogg*, 10 *Wall.* (*U. S.*) 383; *The City of Washington*, 92 *U. S.* (2 *Otto*) 31; *The Clement*, 2 *Curt.* (*U. S. C. C.*) 363, 369.

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Edward L. Collier and *Almon Goodwin* (*Edward L. Collier*, attorney), for plaintiffs-respondents.

This motion to dismiss this appeal is properly made at general term. *Barnum v. Seneca Co. Bk.*, 6 *How. Pr.* 82; *Harris v. Clark*, 10 *Id.* 415; *Morrison v. Morrison*, 16 *Hun*, 507.

The order in question is a discretionary order. An order granting leave to re-examine a witness whose deposition has been taken is within the discretionary powers of the court. *Weeks on Depositions*, 591; *Addleman v. Swartz*, 22 *Ind.* 249; *Kirby v. Cannon*, 9 *Id.* 371; *Gresley's Equity Evidence*, 201; *Sheldon v. Wood*, 24 *N. Y.* 607; *Vide*, also, 19 *Wend.* 578. The right to recall and examine a witness is held to be a matter of discretion, and the rejection of it subject only for the purpose of ascertaining whether the discretion has been abused. *Bissell v. Russell*, 23 *Hun*, 660; *Marshall v. Davies*, 78 *N. Y.* 414; *Meakim v. Anderson*, 11 *Barb.* 215; *Tredwell v. Stebbins*, 5 *Bosw.* 538; *Meyer v. Goedel*, 31 *How. Pr.* 456; *Knight v. Cunningham*, 6 *Hun*, 100; *May v. Burras*, 13 *Abb. N. C.* 384. The courts are very careful not to abuse this discretion.

In *Weeks on Depositions*, 583, we find: "Where the deposition of a witness has been once taken and closed, it is not the practice to allow him to be re-examined without an order of the court, and then only upon good cause shown." *Vide* also, *Pettipiece v. Sayles*, 4 *Mason (U. S. Circ. Ct.)* 312. The rules of equity are that the same witness should seldom or never be examined on the same facts. *Weeks on Depositions*, 590; 2 *A. K. Marsh. (Ky.)* 235.

The time having expired in which to appeal from said order to review the discretion, the defendant cannot bring up said order now for review on an appeal from the judgment as an intermediate order which necessarily affects the final judgment within the mean-

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ing of section 1316 of the Code of Civil Procedure. . . . Said section includes only those orders which affect the strict legal rights of the parties as contradistinguished from those mere questions of practice which every court regulates for itself, and from all matters which depend upon the discretion or favor of the court, etc. *St. John v. West*, 4 *How. Pr.* 329; *Vide*, also, *Cruger v. Douglas*, 2 *Code Rep.* 123; *Selden v. Delaware & Hudson Canal Co.*, 29 *N. Y.* 637; *S. C.*, 29 *Id.* 419; *Tallman v. Hinman*, 10 *How. Pr.* 89. The defendant cannot, at this time, review the facts of said order. In *Thurber v. Harlem, B., M. and F. R. R. Co.*, 60 *N. Y.* 326, it was held by Justice ALLEN that "an order denying a motion for a new trial is not brought before the general term by, and is not reviewable on appeal from a judgment as an intermediate order involving the merits and necessarily affecting the judgment." A review of the facts can only be there had on appeal from the order. Said order is not an order which necessarily affects the final judgment within the meaning of section 1316, Code of Civil Procedure, and cannot be reviewed, the time in which to appeal therefrom having long since expired. . . .

A party cannot have a new commission to re-examine the witness merely on the expectation that he may now swear more definitely than before, in the absence of any suggestion that the witness has made a mistake, or that new evidence has been discovered (*Raney v. Weed*, 1 *Barb.* 220). Where the deposition of a witness has been once taken and closed, it is not practice to allow him to be re-examined without an order from the court, and then only upon good cause shown. *Weeks on Depositions*, 583; *Pettiplace v. Sayles*, 4 *Mason (U. S. Circ. Ct.)* 312. . . The plaintiffs insisted then and now, that witnesses, because they happened to be dealers in beef, could not give their

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opinion as experts in regard to what were the duties of the consignee in handling of beef, but that they should state what was the usage and practice in respect to such transactions. . . . *Allen v. Merchants' Bank of N. Y.*, 22 *Wend.* 215, 222; *Steinbach v. Lafayette Fire Ins. Co.*, 54 *N. Y.* 90; *Ferguson v. Hubbell*, 97 *Id.* 507; *Carpenter v. Eastern Transportation Co.*, 71 *Id.* 574.

BARNARD, P. J.—A large part of the testimony given upon the trial was taken in Liverpool by commission. In respect to some of the interrogatories the answer was not full, and to correct this omission the defendant made a motion to send back the commission for a fuller execution. The motion was denied, and the case was tried before a referee, and judgment was rendered in favor of the plaintiffs.

The defendant appeals from the judgment, and also seeks, on the notice of appeal, to bring up for review the order denying the motion to send back [“] the commission. This order is not one which “necessarily affects the final judgment” in the sense conveyed by section 1316 of the Code of Civil Procedure.

Whether or not a commission was to be returned for further action was discretionary with the court, and dependent upon the facts whether or not the omission to answer was material, or whether the [“] fact existed. Upon the evidence produced upon the motion before the court, at special term, there was no case made to send back the commission. All material questions were answered; and there had been great delay.

The order is not erroneous, even if this appeal brings it up for review.

Upon the merits the entire evidence is not inserted and returned in the case. It is stipulated that there

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is sufficient evidence to uphold the findings and the refusals to find. The questions presented are, therefore, only questions arising upon the admission and rejection of testimony.

The case shows that the plaintiffs advanced money upon consignments of provisions for the English market. It was claimed that some of the provisions were unfit for use, or to a greater or lesser degree damaged upon arrival at Liverpool. The judgment was for the difference between what the property brought and the advancements. The defendant claimed that the consignee was careless and unskillful in the management of the property at Liverpool. It is upon this part of the case that the evidence was mainly given.

The exceptions are very numerous, but an examination of them in detail shows no error. Some parts of answers are excluded as irresponsible. A question as to a fact—the condition of the goods, is fully answered, and beyond this the witness gives an opinion as to the cause. This was irresponsible, and properly excluded. A complete answer is coupled with an opinion that the meat was in the same pickle in which it left New York.

The best answer to the rejection of testimony is contained in the fact that the duties of consignees cannot be established by the opinion of witnesses, ['] who are dealers in the article sold. The law which governed consignments would depend upon facts. All opinions cannot be given in evidence as that of an expert, when the subject does not require any ['] peculiar habits of study to qualify a man to understand it (*Ferguson v. Hubbell*, 97 *N. Y.* 507). ['] Expert witnesses may state what the usage is, and cannot, even in cases where expert evidence is permitted, give an opinion as to the duties of consignees.

Upon the whole case no injustice appears. There

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was proof given sufficient to support a finding that the beef was bad at its arrival at Liverpool, and that the consignee was guilty of no negligence in its treatment by them.

The judgment should, therefore, be affirmed.

PRATT and DYKMAN, JJ., concurred.

NEWELL, APPELLANT, v. WIGHAM, RESPONDENT.

COURT OF APPEALS, MARCH, 1886.

§§ 1508, 1509.

Writ of possession—When not executed—Redemption of leasehold by mortgagee thereof—Conclusiveness of sheriff's return.

The ordinary rule in regard to the execution of a writ of possession is that the plaintiff must be put in full and complete possession; that full and actual possession be given him by the sheriff; that when the plaintiff is put into possession under circumstances plainly indicating that such possession is but formal and momentary, and he is accordingly ousted on the same day, such putting into possession is insufficient, and that the writ of possession will not be regarded as fully executed until the sheriff and his officers are gone, and the plaintiff is left in quiet possession.^[1]

Where the sheriff, in executing a writ of possession, issued in an action of ejectment, did not go into the house at all, but merely reached in and took out a chair and set it out, and it appeared that the party then in possession continued therein, and there was no evidence that he or any one on the premises attorned to the plaintiffs in the execution, or to any one on their behalf, or undertook to hold for or under them, or in any manner recognized title or possession in them, or that any one was put in charge or possession on the part of the plaintiffs,—*Held*, that what was done amounted simply to a notification to the tenant that the sheriff held writs of possession;^[1] that no one was put out and no one put in,^[1] and the writ had not been executed.^[2]

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Where, in such a case, the action was to recover demised premises for non-payment of rent,—*Held*, that for the purpose of cutting off the right of one holding a mortgage on the leasehold to redeem, stronger grounds exist that the writ of possession be executed by an open, visible and notorious change of possession than in the case of a tenant or the defendant in the judgment, and that a mere nominal and secret execution of the writ should not be held to bar him.^[3]

The return of the sheriff is not conclusive as to the execution of a writ of possession issued to him.^[4]

Witbeck v. Van Rensselaer (64 *N. Y.* 27), distinguished;^[5] Newell v. Wigham (16 *N. Y. Week. Dig.* 295), reversed.^[6]
(Decided March 26, 1886.)

Appeal from a judgment and order of the general term of the supreme court, third department, affirming a judgment rendered upon a trial at special term, dismissing the complaint.

Reported below, 16 *N. Y. Week. Dig.* 295.

The facts are fully stated in the opinion.

Isaac H. Maynard (Gilbert & Maynard, attorneys), for plaintiffs-appellants.

William Youmans (W. & G. W. Youmans, attorneys), for defendant-respondent.

RAPALLO, J.—The plaintiff was mortgagee of the lessee's interest in two tracts of land in the Kortright patent held under a perpetual lease from Kortright reserving rent.

This action was brought to foreclose the mortgage on the lease.

The defendant Youmans succeeded to Kortright's title to the fee and the rent, and held such title up to January 17, 1873.

The plaintiff's mortgage was dated July 4, 1864, and recorded August 15, 1864, and was given to secure

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the payment of the sum of \$1,657.25 and interest. It covered one hundred and fifty acres of land in lot 86, and five acres and seventeen rods in lot 101, of the Kortright patent.

The complaint was in the ordinary form in an action for the foreclosure of a mortgage on leasehold property, except that in addition to the usual averments it alleged that in February and March, 1871, Eliza Cruger and William Youmans, who were at that time the owners of the fee, recovered separate judgments in ejectment for non-payment of the rent against the tenant in possession of the one-hundred-and-fifty-acre lot, and that on June 28, 1872, they issued executions or writs of possession on said judgments to the sheriff of Delaware county, who, on November 14, 1872, filed in the office of the clerk of the court his return to said executions, stating that he had delivered possession of the premises to the plaintiffs as required by the writs. The complaint then went on to allege that at the time last mentioned, Youmans was the owner of both of the judgments and of Kortright's title, and set forth proceedings for the re-taxation of the costs in the ejectment suits, and a stay of those proceedings; that the costs amounted to \$1,085.55, but were, by an order entered in December, 1871, ordered to be re-taxed, and that proceedings under that order had been stayed; that if re-taxed in accordance with the opinion delivered by the court on the decision of the motion, the costs would amount only to the sum \$260; that the rent in arrear on the Kortright lease up to the time of the commencement of this action was \$400, and had been tendered by the plaintiff to the landlord, and that the plaintiff had, before the commencement of this action, paid into court all the rent in arrear, and all costs and charges legally incurred by the plaintiffs in the ejectment suits; and that the

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plaintiff in this action was ready and willing to pay said rent and charges.

The relief asked was the usual foreclosure, and a special judgment that the plaintiff's mortgage should not be affected by the judgments in the ejectment; that those judgments might be adjudged paid; that the mortgaged premises be sold and the plaintiff be paid the amount due on his mortgage and his costs, and the amounts paid by him for arrears of rent and costs.

The answer alleged that writs of possession were issued on the judgments, and that on June 27, 1872, the sheriff of Delaware county dispossessed the occupants of the farm and gave the possession thereof to the defendant, William Youmans, Jr., then owner, etc., who then and there became possessed thereof, and continued, etc.

The court dismissed the complaint upon the sole ground that the plaintiff's mortgage was cut off by the judgments in ejectment, and execution executed thereon, and his failure to redeem within six months after execution executed.

It appears from the findings that the executions were returned on November 14, 1872, as having been executed on June 27, 1872, and that on November 18, 1872, the attorney for the present plaintiff received notice of the filing of the return. It does not appear that the plaintiff had any notice of the execution of the writs before that time, and within less than three months afterward, viz., on January 30, 1873, he endeavored to redeem his interest as mortgagee from the judgments in ejectments, by tendering to Youmans, for back rent and costs, with interest, the sum of \$750, and on his refusal to accept that sum, the plaintiff paid the amount into court, and on February 19 following, brought this action, making Youmans a

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defendant as holder of the judgments for costs, and also Martha Wigham, to whom Youmans had, on January 17, 1873, conveyed the fee of the land, Martha being the wife of Richard Wigham, the grantee of the mortgagor, who had taken his deed subject to the plaintiff's mortgage as is expressed in the deed.

The defendant now claims, and the court below held that the plaintiff's mortgage was cut off, and his efforts to redeem were ineffectual, first, because it was too late, and second, because the amount tendered was insufficient.

If the tender was too late, and the six months limited by the statute had expired, the amount tendered becomes immaterial, but if the statutory limitation as to time had not expired, even at the time of the trial of the action, then the insufficiency of the amount tendered would not authorize a dismissal of the complaint, for it contains an offer to pay all the back rents, costs and charges, and the court could have required the payment of the proper amount as a condition of granting relief. It is, therefore, unnecessary now to go into the question of the right of the plaintiff to a re-taxation of the costs and their reductions under the various orders and stipulations set out in the case. The decision of this appeal must turn upon the question whether the six months' limitation had expired.

The plaintiff contends that it had not expired, for various reasons, some of which were considered and passed upon in the court below, and many of which do not appear to have been there raised. First he contends that the execution was void by reason of numerous departures from the requirements of the Code of 1848. Further, that the six months did not begin to run until the execution was returned and filed, Novem-

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ber 14, 1872, as it was not fully executed until that time, the command to make return not having been obeyed. Also that the executions were only partial, not being executions on the whole of the judgments, which included the costs awarded and which should have been collected from the judgment debtor. But a more decisive point than all these is that the executions were never executed, possession of the premises not having been taken by the sheriff or delivered to the person entitled. If this point is well taken, it is decisive of the case without reference to the others.

The facts and circumstances attending the alleged executions of the writs were proved on the trial without objection and were found by the trial judge, and the question is therefore fully presented to us, whether they disclose an execution of the writs sufficient under the statute to cut off the rights of the mortgagee not in possession.

Richard Wigham, in 1870, and while the ejectment suits were pending, conveyed the leasehold title to his son, James M. Wigham, subject to the plaintiff's mortgage, which James M., in and by the deed to him, assumed to pay. It is found at the time when the writs of possession were claimed to have been executed, James M. Wigham was in possession of the premises. The trial judge in his seventh finding of fact, states, among other things, that writs of possession on the judgments of Cruger and Youmans were issued by the sheriff of Delaware County, and that on June 27, 1872, said sheriff executed said writs as by them commanded, and made and signed returns in each case in the following form :

“Delaware County, ss. :

“I, Edward Griffith, sheriff of Delaware county, do duly certify that I have executed this writ by delivering the possession of the premises therein

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described, to the plaintiff, William Youmans, Jr., this 27th day of June, 1872.

“EDWARD A. GRIFFITH,

Sheriff.

“By Alexander Shaw,

Under-Sheriff of Delaware County.”

The plaintiff excepted to so much of his seventh finding of facts as states that the sheriff executed said writs.

The part of the finding thus excepted to is contrary to the evidence and to the fifteenth finding of facts.

The evidence, and the whole evidence on the subject, outside of the sheriff's return, is that of James M. Wigham, the party in possession. He testified that he succeeded his father, the defendant in the ejectment suits, in possession of the premises, and was there at the time the writs of possession were claimed to have been served; that he thought Deputy-sheriff Shaw, and Charles McPhail, a clerk of Youmans, came there; Shaw told his business and asked witness what he should set out; witness told him to set the woman out if he wanted to, and he said he did not want to do that, and he did not go into the house at all, but reached in and took out a chair and set it out and went off; that witness' family were there at the time and remained there after that; that he had stated all that was done.

It does not appear that even the chair was removed from the demised premises. The witness further testified that after the alleged dispossession he met Youmans, and talked about a settlement with him, and he said to witness, “Go home and keep still until the time runs out, and we will beat the old devil out of his mortgage there, up to the head of the river, beside Gilbert and Maynard.”

This conversation was denied by Youmans, and the

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trial court held, that the question of fraud and collusion to cut off plaintiff's mortgage could not be tried in this action for the reason that they were not alleged in the complaint, and that is one of the questions raised by the appellant on his appeal. But the evidence as to what took place at the time of the alleged execution of the writs of possession is not in any respect controverted, and by the fifteenth finding of fact the trial court found that at the date of the execution of the writ of possession, and he was not, nor were his movables, all removed from said premises, and he continued in actual occupation of said premises until about January 17, 1873, the date of the deed from William Youmans to Martha Wigham, since which time she and her husband Richard have been in possession of said premises.

It is not found, nor is there any evidence whatever, that any person was put in charge or possession on part of the plaintiffs in the executions, or that James M. Wigham or any person on the premises attorned to the plaintiffs in the executions, or to any one on their behalf, or undertook to hold for or under them, or in any manner recognized title or possession in them.

['] On these facts it clearly appears that there was no change whatever in the possession, and that what was done amounted simply to a notification to the tenant that the sheriff held writs of possession.

He put no one out, and no one in.

['] The ordinary rule in regard to the execution of a writ of possession is that the plaintiff must be put into full and complete possession; that the possession to be given by the sheriff is a full and actual possession, and that where the plaintiff is put into possession under circumstances plainly intimating that such possession is but formal and momentary, and he is accordingly ousted on the same day, such putting into possession is insufficient, and that the writ of

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possession will not be regarded as fully executed until the sheriff and his officers are gone and the plaintiff is left in quiet possession (*Herm. Exec.* 531-533; *Kingsdale v. Mann*, 6 *Mod.* 27; 2 *Tidd Pr.* 1247).

In the case now before us, there was not even a formal delivery of possession to any one, even for a moment. The sheriff-deputy went away without disturbing the tenant, and leaving him in full and undisturbed possession.

The statute (2 *Rev. Stat.* 506),* sets the six months' limitation running against the lessee or his representatives or assigns from the time possession shall have been taken by the landlord under execution, etc. (section 33), and against a mortgagee of the lease or any part thereof, not in possession of the demised premises, from the time when execution on the judgment shall have been executed (section 35), and any person claiming any interest in the lease may file his bill in equity for relief until the time thus limited has expired.

[?] In the case of a mortgagee out of possession, who is not chargeable with notice of the proceedings against his mortgagor, stronger grounds exist for requiring that, for the purpose of cutting off his mortgage, the writ of possession should be executed by an open, visible and notorious charge of possession, than in the case of the tenant or the defendant in the judgment; and a merely nominal and secret execution of the writ should not be held sufficient to bar him.

One of the arguments used by the learned trial judge in answer to the plaintiff's claim that the time should run only from the filing of the return was that, by the law of this State, possession of real estate by a person was as effectual a notice to the world of his rights in the land as a recorded title.

* The provisions here referred to are new, §§ 1508, 1509 of the *Code of Civil Procedure*.

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This argument would apply where the landlord was put in visible possession of the land under a writ of possession ; but it is difficult to see its application where the change of possession is claimed to have been effected by such a proceeding as is shown in the present case.

['] It cannot be maintained that the return of the sheriff filed on November 14, was conclusive as to the execution of the writs of possession on June 27 (*Browning v. Hanford*, 5 *Denio*, 586 ; *Baker v. McDuffie*, 23 *Wend.* 289 ; *Fitch v. Devlin*, 15 *Barb.* 47).

['] In *Witbeck v. Van Rensselaer* (64 *N. Y.* 27), the court found as a conclusion of facts, that the plaintiff had been put into possession under the writ, and this court held that the finding was sustained by the sheriff's return, together with the facts proved at the trial, which were that the sheriff went on the premises accompanied by the agent for the assignee of the plaintiff in the ejectment ; that the defendant was absent, and the only person in apparent possession was one Carver, the defendant's hired man ; that the sheriff demanded possession of him and declared his intention of removing him, he occupied a small house on the farm, and on the demand being made he signed a written surrender of the premises to the assignee of the plaintiff and an acknowledgment that he held them as tenant at the will of the assignee of the plaintiff. The sheriff and plaintiff's agent then went on various portions and lots of the farm, and the sheriff assumed to deliver possession thereof to the agent. This court in its opinion relied upon those facts, as well as upon the return, to sustain the finding of the trial court. Here no such facts exist, and the finding shows that the plaintiff's assignee was never put in possession, but that on the contrary, the assignee of the defendant was in actual occupation and so con-

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tinued without being in any manner disturbed, or making any attornment.

Many other points were raised on this appeal. The complaint should not have been dismissed as to the five acres and seventeen rods in lot 101, and probably would not have been if the plaintiff had asked for judgment as to those five acres, which he did not do, and we do not therefore make that point a ground of reversal. The consideration of numerous other points raised by the appellant is rendered unnecessary by the conclusion we have reached in respect to the execution of the writs of possession.

The judgment should be reversed, and a new trial ordered, with costs to abide event.

All concurred.

O'DONNELL, APPELLANT, v. MCINTIRE,
RESPONDENT.

SUPREME COURT, FIFTH DEPARTMENT, GENERAL
TERM, JUNE, 1886.

§§ 373, 2232, subd. 4.

Intruder or squatter—Who is—When summary proceedings may be maintained against one entering upon real property under claim of legal title—Tenant, possession when not hostile to landlord.

Where one having a tax deed of certain premises situate in the city of Rochester, acquired possession thereof without the consent, and against the will of one theretofore in actual possession under a legal title as against him, and his deed was thereafter adjudged void in suit between the parties,—*Held*, that he was an intruder within the meaning of section 2232 of the Code of Civil Procedure, —providing that a person intruding into or squatting upon land,

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in a city, etc., may be removed therefrom,—and that summary proceedings to remove him therefrom could be maintained.

The fact that in such a case the owner of the tax deed obtained possession of the premises with the consent of the tenant of the legal owner, who was in possession thereof, and that the tenant attorned to the former pursuant to a clandestine agreement between them, does not relieve the owner of the tax title from the charge of being an intruder.[¹,²]

Where the relation of landlord and tenant has been once established, the possession of the latter and that of his grantee and assignees is the possession of the landlord, and not hostile or adverse; and *it seems*, this is true even where the grantee has taken a deed of the fee in ignorance of the fact that his grantor stood in the relation of a tenant, the latter denying any such relation.[³]

The possession of the tenant is in subordination to the title of the landlord, and continues to be so not only during the running of the term, but is presumed to be such and to remain unchanged until twenty years after the end of the term, notwithstanding any claim by the tenant or his successors of a hostile title.[⁴]

O'Donnell v. McIntyre (16 Abb. N. C. 84), reversed.[⁵]

(Decided June, 1886.)

Appeal from a judgment of the Monroe county court, reversing a final order made by a justice of the municipal court of the city of Rochester, in summary proceedings for the recovery of real property situate in the city of Rochester.

Reported below, 16 Abb. N. C. 84.

The opinion states all material facts.

Fanning & Williams, for petitioner-appellant.

D. C. Feely, for defendant-respondent.

BARKER, J.—The appellant is the owner in fee of an undivided one-third part of the premises. As such owner she was in the actual possession of the entire parcel, by and through her tenant, one Joseph M.

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Bates, who had entered upon a lease, paying a stipulated rent for the use and occupation.

On April 2, 1883, the respondent entered into a negotiation with the said tenant, and concluded an arrangement with him by which the latter agreed to attorn to the respondent, who went into the immediate possession of the premises without the consent of the plaintiff, but with the permission of the said tenant.

At this time McIntire had a tax deed of the premises, which he claimed gave him a title to the premises as against the owner. This deed, however, was invalid as against those parties, and it has been so adjudged by this court for the reasons stated in its opinion in an action between these parties, and reported in 37 *Hun*, 615. These are the material facts upon which it is to be determined whether or not these proceedings to remove the respondent as an intruder could be maintained.

The statute provides that a person in the possession of real property may be removed therefrom, in the manner provided therein, whenever such person "or persons to whom he had succeeded has intruded into, or squatted upon, a parcel of land in a city or incorporated village, without the permission of the person entitled to the possession thereof, and the occupancy thus commenced has continued without permission from the latter" (*Code of Civil Procedure*, § 2232).

The only question to be determined is: Did the respondent gain possession of the premises as an intruder within the meaning of that term as the same is used in said section? The appellant was in the actual possession of the premises under a legal title as against the respondent, and the latter acquired his possession without the consent and against the will of the appellant.

[1] This makes a complete case entitling the

injured party to relief in a summary manner as marked out by the statute. If the defendant sought to gain possession of the premises by a resort to legal remedies, he would have failed for want of any legal right to the occupancy of the premises for any purpose whatever. His negotiation with the tenant for [2] the purpose of acquiring possession of the premises, with the latter's consent, was clandestine, vicious and unlawful, which avails him nothing, and is condemned by legal precepts and good morals.

[3] Where the relation of landlord and tenant has been once established, the possession of the latter and that of his grantee and assignees is the possession of the landlord, and not hostile or adverse, and this is true even where the grantee has taken a deed of the fee in ignorance of the fact that his grantor stood in the relation of a tenant, the latter denying any such relation.

[4] The possession of the tenant is in subordination to the title of the landlord, continues not only during the running of the term, but is presumed to be such and to remain unchanged until twenty years after the end of the term, notwithstanding any claim by the tenant or his successors of a hostile title (*Whiting v. Edmunds*, 94 *N. Y.* 314; *Code Civ. Pro.* § 373).

[5] It is manifest that if the appellant had been advised of the intended action of the respondent, and had been personally present upon the premises when the respondent entered, the latter could not have gained possession without resort to such force as would have amounted to a breach of the peace. The treacherous act of the tenant, induced by the persuasions of the respondent, does not relieve the latter from the charge of being an intruder. The statute is broad enough in its terms, and was intended to meet a case like the one now presented.

[6] As we are unable to discover anything to

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excuse the respondent's conduct, and regard his conduct in gaining possession of the premises as in all respects unlawful, we think the municipal court was correct in treating him as an intruder, and that the judgment of the county court should be reversed, and that in the municipal court should be affirmed, with costs of this appeal.

SMITH, P. J., HAIGHT and BRADLEY, JJ., concurred.

STEDEKER, ET AL., RESPONDENT, v. BERNARD,
IMPLEADED, ETC., APPELLANT.

COURT OF APPEALS, APRIL, 1886.

§ 1205.

Judgment—When separate, may be rendered against one of several defendants on a joint liability—When rendered on the pleadings.

The common law rule that in an action against several defendants upon an alleged joint contract, the plaintiff must fail unless he establishes the joint liability of all the defendants, is no longer the rule of procedure in this State,^[2] but the court is authorized in an action against several defendants to render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper;^[3,4] and where a separate liability of some of the defendants is established on the trial, a separate judgment is authorized, although the cause of action alleged in the complaint is joint only and not joint and several.^[3,4] Where, in an action against several defendants on an alleged joint liability, their answer denies the existence of any joint liability, but admits the individual liability of one of the defendants, the plaintiff is entitled to judgment on the answer against the defendant whose liability is admitted.^[3,4]

Where, in an action against the members of a firm upon a check alleged to have been made by them, the answer, in which all the

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defendants joined, denied that the check was made by the firm, or on its behalf, but alleged that it was made by one of the copartners, the defendant "B.," "for his own private concern, and entirely out of the concerns and business transactions of the firm," and that this was well known to the plaintiffs when the check was made and delivered,—*Held*, that upon the pleadings the defendant "B." was in any event liable upon the check, and the plaintiffs were entitled to judgment against him on the answer.^[1, 6]

Stedeker v. Bernard (17 *N. Y. Weekly Dig.* 540), affirmed.

(Decided April 30, 1886.)

Appeal by the defendant Bernard from a judgment of the general term of the New York court of common pleas affirming a judgment rendered at special term.

Reported below, 17 *N. Y. Week. Dig.* 540.

The action was brought against three persons—Bernard, Taft and Smart—who were alleged to be copartners in business under the firm name of H. O. Bernard & Co., to recover \$5,000 upon a check averred to have been made and delivered by said firm to the plaintiffs on October 21, 1881. All the defendants joined in an answer which set forth that the defendant Bernard individually made a check for \$5,000, in Baltimore, on or about October 28, 1881, but whether the one set forth in the complaint, the defendants had "not information sufficient to form a belief;" that the check so made by Bernard was not made by or on behalf of the defendants' firm or on behalf of any business transaction or dealing of it, or that the firm "ever had owned or possessed any interest therein," or that the firm ever made, indorsed or delivered the check to the plaintiff or any other person; that the check Bernard made "was for his own private concern, and entirely out of the concerns and business transactions of the firm; that this was well known to the plaintiffs when the check was made and delivered."

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The plaintiffs moved, among other things, for judgment on this answer against the defendant Bernard, and an order was made and entered directing judgment against said defendant, and that as to the other two defendants the action be severed and continued. From the judgment entered on this order the defendant Bernard appealed to the general term of the New York court of common pleas, and from its judgment of affirmance this appeal was taken.*

James M. Smith (*A. H. Nones*, attorney), for defendant-appellant.

John Graham (*George Owen*, attorney), for plaintiffs-respondents.

ANDREWS, J.—There is no denial in the answer of the averment in the complaint that the defendant Bernard executed the check in the firm name of H. O. Bernard & Co. Regarding the answer in the light most favorable to the defendant, it simply denies that the check was made by the copartnership, and this denial is coupled with the averment that it was made by the defendant Bernard for his own purposes, and not in the business of the firm, which was known to the plaintiff when he received it.

Upon the pleadings, the defendant Bernard, by his own showing, was, in any event, liable upon the check.

If the action had gone to trial upon the issue presented, and it had been found in favor of the defendant, the plaintiff would nevertheless have been entitled to the judgment against Bernard individually. The common law rule that in an action against several defendants upon an alleged joint contract, the plaintiff must fail unless he establishes the

* A motion to dismiss this appeal was denied, see 93 N. Y. 589.

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joint liability of all the defendants, is no longer
['] the rule of procedure in this State. By the former Code (§ 274), the court was authorized, in an action against several defendants, to render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment was proper. The court, in construing this provision, ['] did not limit its application to cases of joint and several liability, but considered it as authorizing a separate judgment where a separate liability of some of the defendants was established on the trial, although the cause of action, as alleged in the complaint, was joint only (*McIntosh v. Ensign*, 28 *N. Y.* 169 ; *Fielden v. Lahens*, 2 *Abb. Ct. App. Dec.* 111).

['] Section 1205 of the present Code, is quite as comprehensive as section 274 of the former Code, and requires the same construction.

The plaintiff, however, was not, we think, bound to await the trial of the issue before applying for judgment against the defendant Bernard. He not having denied that he made the check, but on the contrary, having alleged under oath, in his joint answer with the other defendants, that it was his individual obligation, and not that of the firm, cannot object if the plaintiff takes him at his word and elects so to consider it.

We perceive no good reason why the plaintiff may not, in a case like this, apply to the court before the trial of the issue, for judgment against the party ['] who, in his answer, while denying the joint liability, at the same time avers facts which show that the plaintiff is entitled, in any event, as against him, to a separate judgment.

We are not concerned with the position in which the other defendants will be placed by the separate judgment against Bernard. They do not appeal, and whether the judgment against Bernard merges and

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extinguishes any remedy against them, it is unnecessary to consider (See *Candee v. Smith*, 93 N. Y. 349).

The judgment should be affirmed.

All concurred.

KENNY, ET AL., RESPONDENTS, v. GEOGHEGAN.
CAMP, TEMPORARY ADMINISTRATOR, ETC., OF
GEOGHEGAN, APPELLANT.

STEICHELMAN, RESPONDENT, v. SAME.
SAME, APPELLANT.

CITY COURT OF NEW YORK, GENERAL TERM, MAY,
1886.

§§ 1380, 1381, 2717, 2718, 2719.

Execution—When leave to issue on judgment against deceased person not granted—Enforcement of such a judgment—The word “lien” defined.

With a few well-defined exceptions, the estates of deceased persons are to be administered by the persons upon whom the trust devolves, by and under the direction of the surrogate's court, without outside interference or control.^[1]

The mode of enforcing the lien of a judgment upon the real estate of a deceased person, both prior to and under the Code of Civil Procedure, stated.^[2]

The term “lien” involves the notion of a vested right in a creditor to control the enjoyment or forbid the disposition of some property until its owner has discharged the debt.^[4]

Whether an execution may issue under section 1380 of the Code of Civil Procedure,—which provides for the enforcement of a judgment against the property of deceased person after the expiration of one year from his death,—*Quare?*^[5]

In the absence of a lien, a judgment against a decedent is regarded as a contract debt of record judicially established,^[6] proved by an

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exemplified copy of the judgment-roll and *prima facie* valid,[⁷] and the judgment creditor, like any other creditor, may, if the decedent's legal representative fails to pay with due diligence, after six months since the granting of letters, apply to the surrogate for an order directing the representative to pay the claim or its just proportional part.[⁸] The statute (2 R. S. 87, § 27), directs that executors and administrators shall proceed with diligence to pay the debts of the deceased, and designates the order of their payment; [⁹] each class designated is entitled to be paid in full before any payment can be made upon a subsequent class, and judgments docketed and decrees enrolled against the decedent are to be paid according to their priority, and without reference to any lien thereof upon real estate.[⁷]

Where the moving papers upon a motion for leave to issue executions upon unpaid judgments against a deceased person alleged, as a reason for the application, that the administrator had in his hands assets consisting of personal property—not described—"upon which the judgments were a lien," and it did not appear how the judgment became a lien upon such assets,—*Held*, that the motion should be denied; [⁹] that the proofs presented did not warrant the granting of leave to issue execution either as matter of right, or in the exercise of judicial discretion; [¹²] that these assets were practically in *custodia legis*, to be administered as the law directs, free from any interference or control by creditors, except in the manner and to the extent authorized by statute, and were not to be transferred to the sheriff for distribution, but were to be administered according to well-defined rules under the direction of the surrogate's court; [¹⁰] that the object of the double application provided for in section 1380 of the Code of Civil Procedure is, that the court in which the judgment was recovered may adjudge the real rights of the parties, and the surrogate may pass upon the rights of the creditor in view of the conflicting or equal claims of others upon the estate, and that either application may precede the other; [¹¹] and that with this object in view, the court would adjudge, as it lawfully may, that the judgments are valid claims, and that the statute of limitations will not run against them until twenty years after their recovery, with such further extensions of time as the statute gives on account of the death of the decedent during the lifetime of the judgment.[¹²]

(Decided May 28, 1886.)

Appeal by the temporary administrators of the judgment debtor, Owen Geoghegan, from order grant-

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ing leave to the respondents to issue executions upon judgments recovered by them against the decedent in his life-time.

The facts sufficiently appear in the opinion.

N. J. Waterbury, Jr., for temporary administrator, appellant.

S. D. Seward and *H. F. Lippold*, for judgment creditors, respondents.

['] McADAM, Ch. J.—The entire system of legislation upon the subject shows that with few well defined exceptions the estates of deceased persons are to be administered by the persons upon whom the trust devolves, by and under the direction of the surrogate's court, without outside interference or control.

The statute directs that executors and administrators shall proceed with diligence to pay the debts of the deceased, and it designates the order of their payment (3 *R. S.* [6th ed.] 95, § 37).* The third subdivision of the section cited, provides for the payment of "judgments docketed, and decrees enrolled, against the deceased, according to the priority thereof." Each class designated is entitled to payment in full before any payment can be made upon a debt of a subsequent class. The judgments docketed and decrees enrolled are to be paid without reference to any lien of the judgment or decree upon real estate (*Ainsley v. Radcliffe*, 7 *Paige*, 439).

['] The lien, if necessary for the collection of the judgment debt, was originally enforced against the heirs or devisees by *scire facias*, making them parties to the record (1 *Paine & Duer's Pr.* 60; *Graham's Pr.* 806), and when this writ was abolished, the remedy was by summons against the heirs or devisees (*Old Code*, § 329, afterward § 376), and in 1850 (ch. 295),

* 2 *R. S.* 87, § 27.

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an auxiliary remedy was furnished by which the lien might be enforced by execution to be issued after leave obtained on notice to the heirs and other parties to be affected. These systems have in turn been abolished, and the remedy is now obtained under section 1380 of the present Code (see preliminary note to *Throop's Code*, at chap. XV. art. 3). This section, following the phraseology of the act of 1850 (*supra*), permits the execution to "be enforced against any property upon which it is a lien," upon obtaining leave, &c. The ['] term "lien," although used at times in different senses, involves the notion of a right vested in a creditor to control the enjoyment or forbid the disposition of some property until its owner has discharged the debt (*Abb. L. Dic.*).

['] Whether an execution may issue under section 1380 (*supra*), in a case where there is no lien to be enforced, is a question not now necessary to be decided, although the implication is against the power. When there is no lien which the creditor ['] is required to enforce for the preservation of his legal rights, the judgment against the decedent is regarded simply as a contract debt of record judicially established, with a preference in the order of payment. If the legal representative fails to pay with diligence, the creditor may, after six months since the granting of letters, arouse him to activity by an application to the surrogate, on petition, for an order directing the representative to pay the claim, or its just proportional part (*Code*, § 2717), and the owner of a judgment, like any creditor, may take this proceeding for the payment of the judgment debt (*Redf. on Surr.* [2d ed.] 564).

['] The judgment is, *prima facie*, a valid outstanding claim against the estate proved by an exemplified copy of the judgment-roll. If there are sufficient assets and no good cause exists to the contrary, we

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suppose the application is one which ought to be granted as of course. Why the plaintiffs have not made such application to the surrogate's court we are at a loss to know. If it be because there are not sufficient assets to pay, the answer is that the plaintiffs have not shown any lien on real or even personal property which gives them any equity over other judgment creditors of the decedent. The policy of the law is to have estates administered by the surrogate and not by the sheriff. Executions against the [°] estates of decedents are not to issue as of course, hence application for leave to issue such writs are necessary, that the court, as well as the surrogate, may determine whether a proper case has been made out for granting the relief applied for.

[°] The moving papers, after stating the fact that judgments were recovered and are unpaid, allege as a reason for the application, that Mr. Camp, the temporary administrator, has in his hands assets consisting of personal property (not described, but probably money), "upon which the judgments are a lien." How these judgments became a lien on assets in the hands of the temporary administrator does not appear, nor can it be readily imagined. It is evidently an imaginary lien, not real, for it is not warranted by any fact presented, nor any law to which our attention has been called.

[°] These assets are practically in *custodia legis*, to be administered as the law directs, free from any interference or control by creditors, except in the manner and to the extent authorized by statute. They are not to be transferred to the sheriff for distribution, but are to be administered according to well-defined rules, under the direction of the surrogate's court. If there are older judgments, they are entitled to a preference out of the very property which is sought to be levied upon, and if there are no older judgments,

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then the plaintiffs have priority, and the contemplated execution and levy are useless. The plaintiffs do not appear to require any aid from this court to collect their judgments, which are mere contract debts of record against the decedent, and they can obtain all the relief they need by a more orderly proceeding in the surrogate's court.

[¹¹] We are aware that the object of the double application to the court and the surrogate is that the court in which the judgment was recovered may adjudge the legal rights of the parties, and the surrogate may pass upon the rights of the creditor in view of the conflicting or equal claims of others upon the estate (49 *N. Y.* 160 ;* 72 *N. Y.* 518) ;† and that either application may precede the other (28 *Hun.* 452 ;‡ 49 *N. Y.* 160*) ; and with this object in view, we adjudge, as we lawfully may, that the judgments are valid [¹²] claims, and that the statute of limitations will not run against them until twenty years after their recovery (*Daniel v. Morrison*, 1 *City Ct. R. Suppl.* 49), with such further extensions of time as the statute gives on account of the death of the decedent during the lifetime of the judgment.

[¹³] But we hold that the proofs presented do not warrant the leave to issue execution, either as matter of right or in the exercise of judicial discretion. It follows, therefore, that the orders appealed from must be reversed, with costs, but with leave to renew on presenting facts showing that such leave has become necessary for the protection of the legal rights of the plaintiffs, respecting the enforcement of their judgments.

HYATT and EHRLICH, JJ., concurred.

* *Marine Bank v. Van Brunt.*† *McNulty v. Hurd.*‡ *Kerr v. Kreuder.*

Fowler v. Callan.

FOWLER, APPELLANT, v. CALLAN, ET AL., RESPONDENTS.

COURT OF APPEALS, JUNE, 1886.

§§ 73, 74.

Champerty and maintenance—What rules as to now prevail—When agreement between attorney and client not void because attorney's compensation contingent and he agrees to pay costs and expenses of litigation.

Neither the doctrine of champerty nor maintenance now prevails in this State except so far as they are preserved by statute,^[1] and the validity of a contract between an attorney and his client is not affected by the fact that, measured by the old rules relating to champerty and maintenance, it would have fallen under their condemnation.^[1]

An attorney may agree upon his compensation for conducting legal proceedings, and it may be contingent upon his success, and payable out of the proceeds of the litigation.^[2]

Where one whose right to certain real estate as devisee under a will was threatened by proceedings before the surrogate which put his interest in peril and made a defense essential to its protection, employed an attorney to defend his rights, and conveyed to the attorney one undivided half of the property involved, in consideration of his agreement to perform such services, and pay all costs and expenses of the litigation and indemnify the client from liability therefor, and so far as appeared, such employment was not induced by any offer or solicitation of the attorney, but originated in the free and unbribed choice of the client,—*Held*, that the agreement was valid,^[3,4,6] that the contract in no respect induced or tended to prolong litigation, and there was no loan or advance or agreement for a loan or advance as an inducement for, or in consideration of the employment.^[3,4,6]

The statute prohibiting any loan or advance or agreement to loan or advance money as an inducement to placing, or in consideration of having placed in the hands of such an attorney any demand for a collection, presupposes the existence of some right of action, valueless unless prosecuted to judgment, which the owner might or might

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not prosecute on his own behalf, but which he is induced to place in the hands of a particular attorney by reason of his agreement to loan or advance money to the client.^[8]

Fowler v. Callan (4 *N. Y. Civ. Pro.* 413), reversed.

(Decided June 12, 1886.)

Appeal by plaintiff from a judgment of the general term of the N. Y. court of common pleas affirming a judgment of the trial term of that court dismissing the complaint.

Reported below, 4 *N. Y. Civ. Pro.* 413.

The action was brought to recover the possession of an undivided half of certain real property situate in the city of New York, to which the plaintiff claimed title under a deed dated May 5, 1865, executed and delivered to him by the defendant Callan, who at that time was the owner in fee and in possession thereof. It appeared that the plaintiff entered into possession under such deed, and held possession of the land in suit until forcibly ejected therefrom. On the trial, at the close of the plaintiff's case, the complaint was dismissed on defendant's motion, on the ground that the deed to plaintiff was given "under an illegal agreement, and for a consideration forbidden by the law," and the plaintiff duly excepted. The judgment thereupon entered was affirmed by the general term on appeal, and this appeal thereafter taken from the judgment of affirmance.

Other facts appear in the opinion.

Scott Lord (*N. Hill Fowler*, attorney), for plaintiff-appellant.

The law as to champerty is not now in force in this State. *Sedgwick v. Stanton*, 14 *N. Y.* 289; *Durgin v. Ireland*, 14 *Id.* 322; *Voorhees v. Dorr*, 51 *Barb.* 580. If it be held that champerty is not entirely done away

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with, but still exists for some purposes, said agreement is nevertheless legal. "Champerty is a bargain with a plaintiff or defendant in a suit for a portion of the land or other matter sued for in case of a successful termination of the suit which the champertor undertakes to carry at his own expense." *Bouvier's Law Dictionary*, Champerty. As with the law of champerty, so with the law of maintenance, it no longer exists in this State. *Sedgwick v. Stanton*, *supra*; *Durgin v. Ireland*, *supra*; *Voorhees v. Dorr*, *supra*. If such a law does exist for certain purposes, the agreement in question does not come within its prohibition. "Maintenance is an agreement in a suit in which the offender has no interest to assist one of the parties to it against the other with money or advice, to prosecute or defend the action without any authority of law." 1 *Russell Crimes*, 176. Also the intermeddling of a stranger in a suit for the purpose of stirring up strife and continuing the litigation. 2 *Parsons on Cont.* 266. The agreement in question does not come under either of the above or any other definition of maintenance. The essential ingredient of the crime (maintenance or champerty), is that the party prosecuting a suit for another shall do it at his own expense. *Benedict v. Stuart*, 23 *Barb.* 420. The appellant is not prosecuting but defending. He is doing this, not at his own expense, for property is given him at the beginning of the suit for such purpose. "The aim of the statute was to prevent attorneys from purchasing claims for the express purpose of instituting suits thereon, and thus oppressing debtors and making costs." *Browning v. Marvin*, 100 *N. Y.* 144, 148; *Wetmore v. Hegeman*, 88 *Id.* 73; *Moses v. McDivitt*, 88 *Id.* 62.

It is respectfully submitted that the case now before this court is lacking in every element to bring it within this its interpretation of the statute.

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J. A. Kamping, and *Quentin McAdam*, for defendants-respondents.

FINCH, J.—It does not affect the validity of the contract between the attorney and his client that, measured by the old rules relating to champerty and maintenance, it would have fallen under their condemnation, for neither doctrine now prevails except so far as preserved by our statutes (*Sedgwick v. Stanton*, 14 N. Y. 289). The attorney may agree upon his compensation, and it may be contingent upon his success and payable out of the proceeds of the litigation. Such contracts are of common occurrence, and while their propriety has been vehemently debated, they are not illegal, and when fairly made are steadily enforced. In substance, that was the contract her made, and there would be no question about it had it not contained a provision by the terms of which the attorney not only agreed to rely upon success for his compensation, but also to assume all costs and expenses of the litigation, and indemnify his client against them. It is this feature of the contract which raises the question necessary to be determined.

The facts of the case are not very fully developed, but appear to be that the defendant as devisee under a will, was entitled to certain real estate, his right dependant upon the validity of the will, and in some manner threatened by proceedings before the surrogate which put his interest in peril and made a defense essential to its protection. In this emergency he sought the aid and professional service of the plaintiff and retained him as attorney. The latter neither sought the retainer nor did anything to induce it. So far as appears was not occasioned by any offer or solicitation of his, but originated in the free and unbribed choice of the client. The evidence does not show whether the latter had gained possession of the land

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devised or was out of possession, but he gave the attorney a deed of one undivided half part of the property, taking back his covenant to conduct the defense to its close, paying all costs and expenses of the litigation, and indemnifying the devisee against all such liability. The agreement appears to have been purely one for compensation. If the client had given to the attorney money instead of land, the contract would have differed in no respect except the contingent character of the compensation. The arrangement contemplated success in the litigation, in which even the land would pay the costs and expenses and the attorney's reward, and both would be discharged out of the property of the client placed in the hands of the attorney for that precise purpose. The contract in no respect induced the litigation: that was already begun, and existed independently of the agreement and originated in other causes; it did not tend to prolong the litigation; it made it to the interest of the attorney to close it as briefly and promptly as possible, and at as little cost and expense as prudence would permit.

['] The plaintiff, therefore, stirred up no strife, induced no litigation, but merely agreed to take for his compensation so much of the value of the land conveyed to him as might remain after, out of that value, the costs and expense, had been paid. We do not think the statute condemns such an agreement (3 *R. S.* [6 ed.] 449, §§ 59, 60; * *Code*, §§ 73, 74). The Code revision changed somewhat the language of the prohibition, but nevertheless must be deemed a substantial re-enactment of the earlier sections (*Browning v. Marvin*, 100 *N. Y.* 148). They forbid, first, the purchase of obligations named by an attorney for the purpose, and ['] with the intent of bringing a suit thereon; and second, any loan or advance, or agreement to loan or

* *R. S.* 487, §§ 71, 72.

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advance, as an inducement to the placing, or in consideration of having placed, in the hands of such an attorney any demand for collection. The statute presupposes the existence of some right of action, valueless unless prosecuted to judgment, which the owner might or might not prosecute on his own behalf, but which he is induced to place in the hands of a particular attorney by reason of his agreement to loan or advance money to the client. It contemplates a case in which the action might never have been brought but for the inducement of a loan or advance offered by the attorney, and in which the latter by officious interference procures the suit to be brought, and obtains a retainer in it. The statute speaks of a demand which by enforcement will end in a collection—phrases which have no aptness to the situation of one simply defending a good title to land, against the efforts of others seeking to destroy the devise under which he claims. The plaintiff made no loan or advance in any proper sense of those words. They imply a liability on the part of the client to repay what was thus lent or advanced. The attorney loaned nothing, and he advanced nothing to the client which the latter was bound to reimburse. Simply, he was paid in advance an agreed price, taken in land instead of money, and out of which he was first to pay costs and expenses. The facts before us are not within the terms of the statutes, as it respects the demand which is the subject of collection, but our conclusion rests more strongly upon the conviction that the agreement made was one for compensation merely, and had in it no vicious element of inducing litigation or holding out bribes for a retainer.

The judgment should be reversed, and a new trial granted, costs to abide the event.

All concurred.

McCaulay v. Palmer.

MCCAULAY, RESPONDENT, v. PALMER, APPELLANT.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM, MARCH, 1886.

§ 802.

Contempt—Party cannot be punished for, in disobeying order unless it was personally served on him—Examination of party before trial.

To bring a party into contempt for violating an order, it must have been served personally upon him by delivering a copy thereof to him, and at the same time exhibiting to him the original.^[2] The consequences of a contempt are serious and often severe in the punishment pronounced by the court, and before a party can be subjected to them there must be a strict compliance with the practice.^[2]

Where, upon the return day of an order for the examination of a party before trial, a motion was made to vacate the order, the decision of which was reserved and thereafter denied, and an order made required the party to appear and submit to an examination on a day therein named,—*Held*, that to put the party in contempt for failing to submit to an examination this last order must be served on him personally; that service thereof on his attorney was not sufficient.^[1, 3]

Service without the State of an order to show cause why a party should not be punished for contempt is a nullity.^[4]

(*Decided March 27, 1886.*)

Appeal from an order directing an attachment to be issued to bring the defendant before the court to answer for his alleged disobedience of orders requiring him to appear and be examined as a witness, at the instance of the plaintiff, before trial.

The opinion states the facts.

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G. Zabriskie (Burrill, Zabriskie & Burrill, attorneys), for defendant-appellant.

The provision of the Code for the service of papers, otherwise than personal, do not apply to service of a paper to bring a party into contempt. *Code Civ. Pro.* § 802. Without special authority of law, service outside of the territorial jurisdiction of the court is a nullity. *Green v. Oneida Com. Pleas*, 10 *Wend.* 592; *Litchfield v. Burwell*, 5 *How. Pr.* 341, 346. The order was never served upon the defendant, and no one is in contempt for disobeying an order of the court unless it was personally served. *Code Civ. Pro.* § 802. An order for the examination of the party must be personally served on the party as well as on his attorneys. *Mayer v. Noll*, 56 *How. Pr.* 214. The order punishes a man for disobeying an order which not only was not served on him, but of which he actually never heard; he might as well be punished for disobeying an order which was never made. The direction contained in section 875 for service of the order upon the attorney does not supersede the necessity of service upon the party. Under the Code of Procedure, a summons or subpœna was required to be personally served. *Van Rensselaer v. Tubbs*, 31 *How. Pr.* 193.

L. Laflin Kellogg, for respondent.

DANIELS, J.—Upon the return day of the order directing the defendant to appear and submit to an examination as a witness, an application was made in his behalf to dismiss it. The motion for that purpose was not then decided, but it was retained by the justice presiding at the court under consideration, from November 6 to 14, 1885. On the last day mentioned, the motion was denied and an order was then made requiring the defendant to appear on November 19, 1885, pursuant to the preceding order for his examina

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tion. It has been affirmed in behalf of the plaintiff that he did not appear personally at the time when the motion was made to vacate the first order. But the correctness of this statement was controverted by his attorney, in whose affidavit it is stated that he was personally present in court at the time when, by the first order, he was required to appear. It is not, however, necessary to decide whether he was personally present at that time, or not, for he was not then required to be examined. Neither was his default taken for omitting to appear, if he was not in fact present. And when the second order was made, a different time was necessarily designated when he was required to appear and submit to the examination. This second order was served upon his attorneys, but it was not served upon him, and it was made in part the foundation of the order, from which the appeal has been taken, directing the issuing of the attachment. That order depends, therefore, upon the second order made in the proceeding, and upon the defendant's failure to comply with the direction contained in it requiring him to appear on November 19. And as he is not shown to be in contempt, for the violation of the direction contained in the second order, the direction for the issuing of the attachment in the order from which the appeal has been taken cannot be sustained.

[?] To bring a party into contempt it is the practice of the court to require the order which he is charged with violating to be served personally upon him. This is to be done by delivering to him a copy of the order, and at the same time exhibiting to him the original. The consequences of a contempt are serious, and often severe in the punishment pronounced by the court, and before a party can be subjected to them, a strict compliance with the practice has been required to be observed. The object of the

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rule is to furnish the individual himself with an ample opportunity to understand the charge made against him, and to prepare to meet it as best he may. It is a sound and salutary rule, for the protection of the party, the observance of which cannot be dispensed with, and it has accordingly been held by the general term in this department, that the order the party may be charged with violating, must be served personally upon him, before proceedings can be successfully instituted and carried on, to punish him for the contempt arising out of its disobedience (*Mayer v. Noll*, 56 *How. Pr.* 214).

[³] This rule was not complied with, and the order directing the attachment to issue was unauthorized. To enable the court to make such an order, as it proceeded in part upon each of the other orders, it was necessary to show that the defendant was in contempt for failing to comply with the second order, and that could only be done by making proof of personal service of the order upon him.

[⁴] The order to show cause why he should not be punished for disobeying the two orders requiring him to appear and be examined, was served upon him at New Brunswick, in the State of New Jersey. This service under the circumstance was a substantial nullity, supplying the court with no authority to proceed in any manner upon it (*Lichfield v. Burwell*, 5 *How. Pr.* 341, 346).

As the order directed the attachment to issue, which might have been made without notice, this failure to make legal service of the order to show cause would not probably be very important, if the attachment itself had not been founded in part upon the second order directing the appearance of the defendant. For the attachment might have been directed without notice to the defendant, as its object was simply to bring him before the court to answer for the

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alleged contempt. But before it could be issued, the practice required that he should appear to be in contempt. That fact was not established, because of the failure to serve the second order personally upon the defendant and to make proof of such service.

The further appeal from the order denying the application for a re-settlement of the order already considered will, of course, be disposed of on the appeal taken from the order directing the attachment to be issued.

That order should be reversed, with the usual costs and disbursements, and the attachment should be set aside.

DAVIS, P. J., and BRADY, J., concurred.

MCLEAN, APPELLANT, v. THE ST. PAUL & CHICAGO RAILWAY COMPANY, RESPONDENT.

N. Y. COURT OF COMMON PLEAS, GENERAL TERM,
JUNE, 1886.

§ 266.

Jurisdiction—Objection to, of superior city court, how and when waived.

An objection to the want of jurisdiction of a superior city court must be taken by answer, and when not so taken is waived, and that although the complaint contains averments which invite the objection and furnish proof in support of it.

Pease v. Delaware, Lackawanna & Western R. R. Co. (10 *Daly*, 459);
Popfinger v. Yutte (4 *East. Rep.* 694), followed.
(Decided June 7, 1886.)

Appeal by plaintiff from a judgment entered on the dismissal, at trial term, of the complaint, on the ground

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that it appeared on the face thereof that the court had not jurisdiction of the action or of the subject thereof.

It appeared from the complaint in this action that the defendant is a foreign corporation, created by and existing under and pursuant to the laws of the State of Minnesota; that the plaintiff was a resident of the city of Brooklyn; that the parties to the three contracts sued on were all, at the time of making them, non-residents of the State; that two of the contracts were executed at St. Paul, Minnesota, and that the causes of action set out in the complaint were assigned to the plaintiff at the city of New York.

The action was commenced February 7, 1889, and the answer of the defendant served February 27, 1879. On April 7, 1884, the cause came on for trial, but a juror was withdrawn and the trial suspended. The cause again came on for trial in February, 1885, and the plaintiff's complaint dismissed. Upon appeal, the judgment thereupon entered was reversed, and a new trial ordered. When the cause was the third time called for trial, the motion was made which resulted in the judgment now appealed from. No objection to the jurisdiction of the court was taken in the answer, and the objection thereto was first raised on the appeal from the first judgment dismissing the complaint. The court then overruled the objection, saying: "The question as to jurisdiction comes too late. It was not raised in the court below, and after two trials without objection upon that point, it must be assumed that the parties to the action voluntarily submitted to the jurisdiction of the court."

D. M. Porter, for plaintiff-appellant.

F. L. Stetson and *C. W. Bangs* (*Bangs & Stetson*, attorneys), for defendant-respondent.

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DALY, J.—The Code declares that the want of jurisdiction in the superior city court is matter of defense and is waived by appearance, unless it is pleaded in the answer (*Code Civ. Pro.* § 266). It thus appears that want of jurisdiction is a defect which the defendant may waive. If he waives it, the court should proceed, notwithstanding it may appear that if the objection were properly taken to the jurisdiction, such objection should be sustained.

The fact that the complaint contains averments which invite the objection of want of jurisdiction and furnish proof in support of such a plea does not justify the court in refusing to proceed with the case if the defendant declines to take the objection in the way pointed out by law. The option is with the defendant; his consent in effect confers jurisdiction, for he may and does waive objection by failure to plead want of jurisdiction as defense. We so held in *Pease v. Del., Lac. & W. R. R. Co.* (10 *Daly*, 459); and the question is settled by the decision in *Popfinger v. Yutte* (*Court of Appeals, March, 1886*; 4 *East. Rep.* 694), on appeal from the superior court. The jurisdiction of this court and the superior court in such a case is identical, and section 266 of the Code applies to both courts.

The judgment should be reversed and a new trial ordered, with costs to abide event.

All concurred.

Estate of Brick.

ESTATE OF ELIZABETH BRICK, (OTHERWISE GILBERT), DECEASED.

SURROGATE'S COURT, NEW YORK COUNTY, JUNE, 1886.

§§ 2817, 2818.

Testamentary trustee—Removal of—Notice required on appointing successor—When bonds required.

The fact that a testamentary trustee has never signified his acceptance of the office, and has never qualified to assume its duties, is not a valid objection to a proceeding to remove him on the ground that he is disqualified to act.^[1, 2] The *status* of a person appointed by a will as testamentary trustee and disqualified from acting as such by reason of alienage and non-residence, is practically the same as that of an executor, who, though similarly disqualified, has in fact obtained letters in the absence of opposition.^[3]

Where one named in a will as a testamentary trustee is a non-resident alien, whatever authority or show of authority is given him by the will may be extinguished by the surrogate.^[4]

In a proceeding in the surrogate's court for the appointment of a trustee in the place of one removed, it is not necessary that all persons interested in the trust property or estate should be made parties, but it is for the court to determine what notice shall be given.^[5]

The statute does not make the execution of a bond essential in a case where the decree by which one trustee is removed designates another in his place,^[6] but the surrogate may, in his discretion, require a bond.^[7]

(Decided June, 1886.)

Proceedings for the removal of a testamentary trustee.

The opinion states the facts.

Charles Stewart Davidson, for petitioner.

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Scott & Cromwell, for next-of-kin and heirs-at-law.

Brownell & Lathrop, for W. W. Gilbert.

ROLLINS, S.—The testatrix died in this city on July 6, 1883. She left a last will and testament whereby she bequeathed and devised her entire estate to one George Henry Lewis, as trustee, with directions to sell the same, and after payment of her just debts to invest the proceeds of sale, and to hold such investments upon certain trusts in such will specified. That instrument was admitted to probate on October 22, 1885. In behalf of George Lane, an infant beneficiary thereunder, objection was interposed to the granting of letters testamentary to George Henry Lewis, upon the ground that he was a non-resident alien, and was therefore not qualified to act as executor. This objection was sustained, and the public administrator was, in December, 1885, appointed administrator *cum testamento annexo* of this estate. George Lane has since filed a petition wherein he represents that the same causes which disqualified Lewis from becoming executor disqualified him also from acting as testamentary trustee. The petitioner accordingly asks that the said Lewis be removed from the office of trustee, and that another be appointed in his place. Mr. Lewis himself is the only person who has been cited to attend this proceeding, and no person else has asked leave to intervene; but certain counsel, whose clients claim to be interested in the estate, have suggested as *amici curiæ* that the court is without jurisdiction to grant the relief prayed for, and that in no event should a new trustee be appointed until all persons absolutely or contingently entitled to take under the will shall have been duly notified.

Whatever authority the surrogate has in a case like

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the present is derived from sections 2817 and 2818 of the Code of Civil Procedure.

Section 2817 provides as follows: "A person beneficially interested in the execution of the trust, may present to the surrogate's court a written petition, duly verified, setting forth the facts, and praying for a decree removing a testamentary trustee from his trust; and that he may be cited to show cause, why such a decree should not be made. . . . Where, if he was named in a will as executor, letters testamentary would not be issued to him, by reason of his personal disqualification or incompetency."

['] Now it is admitted that the respondent has never acted as trustee under this will, has never signified his acceptance of the office, and has never been qualified to assume its duties. It is insisted that for that very reason he cannot now be removed.

['] As a mere verbal criticism, this objection is not without force, but when it is remembered that a competent testamentary trustee derives his authority directly from the will appointing him; that he requires and receives no letters from the surrogate as a badge of such authority; that, except under special circumstances, no bond can be exacted from him as security for the due performance of his duties; and when the language of section 2817 is carefully considered and compared with that of section 2685, it will be discovered that the objection has no solid foundation.

The present situation, indeed, seems to me to be one for which the legislature intended to furnish the precise relief which this petitioner asks. If the respondent had applied for and obtained letters testamentary, being at the same time a non-resident alien, the surrogate could, undoubtedly, upon proper application, have revoked such letters and removed him from office, even in advance of any exercise or

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attempted exercise on his part of his functions as such executor (*Code Civ. Pro.* § 2685, subd. 1).

[³] The status of a person appointed by a will as testamentary trustee, and disqualified from acting as such by reason of alienage and non-residence, is practically the same as that of an executor, who, though similarly disqualified, has in fact obtained letters in the absence of opposition.

This conclusion is strengthened, I think, by the declaration of section 2514, subdivision 6, that the expression "testamentary trustee," as used in the Code, "includes every person (with certain exceptions) who is designated by a will or by any competent authority to execute a trust created by a will."

[⁴] The respondent is a person designated by a will to execute its trusts, and I hold that whatever authority or show of authority the will gives him may be extinguished by the surrogate in the exercise of his jurisdiction under section 2817.

Section 2818, as amended by chapter 408 of the Laws of 1884, provides that "when a sole testamentary trustee . . . is by a decree of the surrogate's court removed . . . and the trust has not been fully executed, the same court may appoint his successor, unless such an appointment would contravene the express terms of the will. . . . Where a decree removing a trustee . . . does not designate his successor, . . . the successor must be appointed and must qualify in the manner prescribed by law for the appointment and qualification of an administrator with the will annexed."

It is claimed that under this section an appointment of a new trustee ought not to be made until all persons interested in the estate shall have been made parties to the proceeding, and that the trustee when appointed should give such bond as would be required from an administrator with the will annexed.

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[⁶] It is clear that the statute does not make the exaction of a bond essential in a case where the decree by which one trustee is removed, designates another in its place.

[⁷] That in such a case, however, the surrogate may, in his discretion, require a bond I have no doubt (Matter of Whitehead, 3 *Dem.* 227; Tompkins v. Moseman, 5 *Redf.* 402; People v. Norton, 9 *N. Y.* 176; Milbank v. Crane, 25 *How. Pr.* 193; Matter of Stuyvesant, 3 *Edw. Ch.* 299; Matter of Jones, 4 *Sandf. Ch.* 615; Matter of Robinson, 37 *N. Y.* 261).

[⁷] These decisions also establish that in a proceeding for the appointment of a trustee it is not necessary that all persons interested in the trust property or estate should be made parties, but it is for the court, in its discretion, to determine to whom notice shall be given. I understand that in the case at bar the attorneys who were lately before the surrogate as *amici curiæ* are authorized to represent all the beneficiaries under the will. They may have formal notice of this application, and will be heard in respect to the selection of the trustee to be appointed, and the propriety of exacting a bond.

Swenarton v. Shupe.

IN RE SWENARTON, APPELLANT, v. SHUPE.

SUPREME COURT, FIRST DEPARTMENT, GENERAL TERM,
MARCH, 1886.

§§ 14, 2033, 2266, 2281.

Civil contempt—Power to punish for—Adjudication that party's right or remedy has been defeated, etc., necessary—Discharge on habeas corpus.

A proceeding to punish a party for a contempt in a civil action or special proceeding by which a right or remedy of another has been defeated, impaired, impeded or prejudiced, has been plainly authorized by the Code of Civil Procedure (§§ 14, 2266, 2281).^[1]

To authorize the punishment of a party for a civil contempt, it must be made to appear and be determined by the court that the misconduct complained of was calculated or did actually defeat, impair, impede or prejudice the rights or remedies of a party to an action or special proceeding brought in court or before a judge or referee,^[2] and where an order directing a commitment for a contempt fails to so adjudge, it furnishes no foundation whatever for the imprisonment of the wrong-doer;^[3] the court is without jurisdiction to punish him,^[3] and he may be discharged from imprisonment thereunder, upon *habeas corpus*.^[4]

Albany City Bank v. Schermerhorn (9 Paige, 372);^[3] Clark v. Binninger (75 N. Y. 344);^[4] followed.

(Decided March 27, 1886.)

Appeal made from order made upon *habeas corpus* discharging respondent from imprisonment.

In 1884, the appellant commenced a proceeding by petition against the respondent, an attorney, to compel the payment of certain moneys alleged to belong to the appellant. On February 29, 1884, an order was made in the proceeding requiring the respondent to deposit within twenty-four hours the sum of \$6,500 named in the petition, with the clerk of this court

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pending the proceeding. The deposit was not made as required by the order, and on March 3, 1884, an order was granted requiring the respondent to show cause why he should not be punished as for a contempt for disobeying said order. March 24, 1884, an order was entered adjudging the respondent guilty of contempt and directing that he "pay to the clerk of this court a fine of \$6,500 for the indemnity and the use of the petitioner," and that until he pay the said fine he be imprisoned, and on the same day a commitment was issued to carry the order into effect. Neither the order adjudging the respondent in contempt, nor the warrant of commitment contained any adjudication that the offense charged was "calculated to or actually did defeat, impede, or prejudice the rights or remedies" of the appellant. On July 15, 1885, the sheriff of the city and county of New York arrested the respondent, and thereafter a writ of *habeas corpus* was sued out, and on August 4, 1885, the order appealed from was entered.

Robert L. Harrison (MacFarland & Reynolds, attorneys), for appellant.

Cited, in support of contention that this was not a case in which the commitment would be reviewed on *habeas corpus*: *Exparte Kearney*, 7 *Wheat.* (U. S.) 38; *People v. Jacobs*, 5 *Hun*, 428; *aff'd*, 66 *N. Y.* 8; *People v. Cassels*, 5 *Hill*, 164, 167.

George W. Stephens (Foster & Stephens, attorneys), for respondent.

DANIELS, J.—The order under which the commitment was issued for the imprisonment of Shupe was produced upon the hearing of the return to the writ of *habeas corpus*, and from that it appeared that his commitment was directed for disobeying an order

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directing him to deposit with the clerk of this court, to await the result of certain proceedings, the sum of sixty-five hundred dollars. He was adjudged guilty of contempt for having willfully disobeyed the order, and fined by the court the sum of sixty-five hundred dollars, for the indemnity of the petitioner in the proceedings. And it was further ordered that he should be committed to the common jail until he paid the fine, and that a commitment should issue to carry the judgment into effect.

While it was adjudged in the order that the attorney Shupe was guilty of a willful contempt in his disobedience of the preceding order, it is still evident that the proceeding for his fine and imprisonment was not carried on upon that foundation. For where a party is proceeded against for a criminal contempt, the punishment to be imposed upon him, by section 9 of the Code of Civil Procedure, cannot exceed the sum of two hundred and fifty dollars and thirty days imprisonment, either or both, in the discretion of the court. The proceeding must, therefore, be construed and held to have been under the other provisions of Code, authorizing a person to be punished for a contempt in a civil action or special proceeding for misconduct by which a right or remedy of another may be defeated, impaired, impeded or prejudiced. A

[¹] proceeding to punish a party for misconduct of this description has been plainly provided by the Code of Civil Procedure, by sections 14, 2266 and 2281.

But where proceedings under these sections are taken, it is indispensable for the punishment of the party

[²] that it should be made to appear and be determined by the court that the misconduct complained of was calculated to or actually did defeat, impair, impede, or prejudice the rights or remedies of a party to an action or special proceeding brought in court or before a judge or referee. No adjudication

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of this character was made by the order directing the commitment, or the preceding order, neither was it in any form adjudged that the petitioner in the proceeding had sustained loss or damage to the amount of the fine imposed upon the attorney, or, in fact, in any amount whatever. The order, therefore, failed to exhibit a compliance with what it has been required shall be adjudicated before a party in a civil proceeding shall be punished by way of contempt. A similar provision of the Revised Statutes was examined in *Albany City Bk. v. Schermerhorn* (9 *Paige*, 372), where the law was held to be, as it has also been declared by section 2281 of the Code of Civil Procedure, that to warrant the punishment of the party it must be adjudged by the order that "the accused has been guilty of the contempt, and that such misconduct was calculated to and did impair, defeat, impede and prejudice the rights or remedies of the prosecutor or parties in the cause, and imposing a fine sufficient to indemnify them and to satisfy the costs and expenses;" and "where anything further remains to be done by the party guilty of the contempt, the order should also specify particularly what he is to do and the manner in which it is to be done, to entitle him to his discharge upon the payment of the fine imposed."

['] (*Id.* 379). And the same rule was substantially followed in *Clark v. Binninger*, 75 *N. Y.* 344.

As this order wholly failed to comply with this requirement of the law, it furnished no foundation

['] whatever for the imprisonment of the attorney.

The facts upon which this has been made dependent were not determined by or found in the order in any form whatever. And, in the absence of this compliance with the requirement of the statute, there was no jurisdiction in the court to subject him to the punishment imposed upon him. His imprison-

['] ment was consequently unlawful, and he was

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entitled to be relieved from it on *habeas corpus*, under the authority conferred by section 2033 of the Code of Civil Procedure.

The order from which the appeal has been taken should be affirmed, with ten dollars costs, besides the disbursements.

BRADY, J., concurred.

ABENDROTH v. THE MANHATTAN RAILROAD
COMPANY.

SUPERIOR COURT OF THE CITY OF NEW YORK.
SPECIAL TERM, MAY, 1886.

§ 289.

Stenographer's minutes—When order requiring parties to action to pay for copy of, for use of court, may be made

Section 289 of the Code of Civil Procedure,—providing that if a “judge requires a copy of any proceedings, written out at length from the stenographer's notes, he may make an order directing one half of the stenographer's fees therefor to be paid by each of the parties to the action or special proceeding,” etc.,—does not limit the time for making such order. Accordingly, *held*, in a case where the stenographer's minutes were required for a proper decision of the case, that the order could be made after the costs had been taxed, and the taxation would be reopened and the costs sent back to be retaxed after the order was made.

(Decided May 18, 1886.)

Motion for a new taxation of costs.

The action was tried before the court at special term, and, a copy of the stenographer's minutes being necessary for the proper determination of the case, the

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justice before whom it was tried ordered one, but did not at the time make any order relative to the payment of the fees therefor. Subsequently judgment was rendered, and a bill of costs taxed, in which was included such stenographer's fees. The defendant thereupon made this motion, asking thereon that each party to the action be required to pay one half the stenographer's fees.

Davies, Cole & Rapallo, for defendant and motion.

Edward B. Cowles, for plaintiff, opposed.

INGRAHAM, J.—Section 289 of the Code provides that if the judge requires a copy of any proceeding written out at length from the stenographer's minutes, he may make an order directing that one half of the stenographer's fee therefor shall be paid by each of the parties to the action or special proceeding, at the rate of ten cents for each folio so written out, and may enforce payment thereof. The stenographer's minutes in this case were required for a proper decision of the case. Nothing is said in this section as to the time of the order directing one-half of the stenographer's fees to be paid by each of the parties to the action shall be made, and, as this was a case in which the stenographer's minutes were required by the court, there is no reason why the order directing that one-half of the stenographer's fees shall be paid by each of the parties to the action should not now be made, and I now make such an order.

The taxation of costs by the clerk will be reopened, and the costs sent back to him to be retaxed after such order is made.

Wilson, &c. Co. v. Daggett.

THE WILSON BROTHERS WOODENWARE &
TOY COMPANY, JUDGMENT CREDITOR AND
RESPONDENT, v. DAGGETT, JUDGMENT
DEBTOR AND APPELLANT.

CITY COURT OF NEW YORK, GENERAL TERM, MAY,
1886.

§§ 2432, *et seq.*

Supplementary proceedings—Extent of examination in, where debtor has made general assignment—When creditor cannot attack assignment.

It is an elementary rule that creditors receiving a benefit under an assignment become parties to it, and are estopped from afterwards impeaching it. Creditors have an election as to which course they will pursue, and, having once made an election, are concluded by it, and cannot revoke it.

A creditor who has proved his claim against his debtor in assignment proceedings, has elected to join in aid of the purpose of the assignment, which is the bringing in and distributing of the assigned property, according to the terms of the assignment.

A judgment creditor who has proved his claim against his debtor in general assignment proceedings, and thereby elected to join in the assignment, can examine the debtor in proceedings supplementary to execution only as to property acquired by him subsequent to the assignment.

(Decided May 28, 1886.)

Appeal by the judgment debtor from an order of the special term, denying motion to limit his examination in proceedings supplementary to execution to property acquired subsequent to the making of a general assignment by him, and to set aside a subpoena *duces tecum* issued herein.

In October, 1885, the judgment debtor, who was, at that time, a commission merchant in the city of New

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York, purchased of the above named judgment creditor, in the course of business, goods amounting to about \$130 in value. Subsequently, and on the 10th day of the same month, the judgment debtor made a general assignment for the benefit of his creditors, to John O. Heald. On November 24, following, the judgment creditor brought an action of contract against the judgment debtor, to recover the purchase price of the goods, and obtain in said action the judgment upon which this proceeding is based. Execution was duly issued, and returned unsatisfied, and an order for the examination of the judgment debtor as to his property before William Van Dorsee, Esq., who was appointed referee for that purpose, was thereupon obtained on January 2, 1886. The examination was commenced under this order January 5, 1886, and is still pending. This examination has been devoted wholly to the discovery of the business transactions of the judgment debtor and the condition of his business at and prior to the making of the assignment, the facts and circumstances attending the making of the same, and the property conveyed thereby, and a subpoena *duces tecum* has been issued by the referee and served upon the assignee, requiring him to produce, for the purpose of this discovery, a great number of books and papers. On February 18, 1886, and pending this examination, the judgment creditor, in pursuance of a notice to creditors issued and served for that purpose by the assignee, came in and proved his claim against the judgment debtor in the general assignment proceedings. This proof of claim was duly presented to the referee at the last hearing herein, and objection was duly made to the line of the examination, but the referee did not consider it within the line of his province to take notice of the proof of claim, and accordingly overruled the objection; suggesting, however, that the proof of this claim might, perhaps,

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be made the basis of an application to the court. The motion was thereupon made which led to the order from which this appeal is taken.

Henry P. Starbuck, for judgment debtor, respondent.

In proceedings supplementary to execution the judgment debtor can be examined concerning his property only. *Code Civ. Pro.* § 2435. The only ground upon which the phrase "his property" is held to cover property previously conveyed by the judgment debtor by general assignment or otherwise, is that the examination may disclose facts upon which, in equity, the conveyance may be set aside as fraudulent by the judgment creditor and the property so applied to the satisfaction of the judgment. *Schneider v. Altman*, 8 *N. Y. Civ. Pro.* 242, and cases cited. In such cases it is considered in equity that "property of a debtor transferred by him in fraud of creditors still remains as to them the property of the judgment debtor." It constitutes equitable assets of the debtor. *Underwood v. Sutcliffe*, 77 *N. Y.* 58-62. But by coming in and proving his claim proceedings under the general assignment act, a creditor elects to accept the benefits of the assignment, and is irrevocably barred from attacking it either personally or through a receiver appointed in supplementary proceedings. Citing *Cavanagh v. Morrow*, 67 *How. Pr.* 241, 245; *Matter of Holbrook*, 99 *N. Y.* 539, 546; *Rapalee v. Stewart*, 27 *Id.* 310-313, 314; *Rodermound v. Clark*, 46 *Id.* 354; *Moller v. Tuska*, 87 *Id.* 166; *Bostwick v. Menck*, 40 *Id.* 383, 385, 386; *Kennedy v. Thorp*, 51 *Id.* 174.

Arthur P. Hilton, for judgment creditor, respondent.

McADAM, Ch. J.—The judgment creditor herein, in

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pursuance of notice to creditors, came in and proved his claim against the judgment debtor in the general assignment proceedings; and having availed himself of the provisions of the general assignment act he has elected to join in aid of the purpose of the assignment, which is the bringing in and distributing of the assigned property according to the terms of the assignment (*Matter of Holbrook*, 99 *N. Y.* 539, 546). Creditors have an election as to which course they will pursue. They cannot pursue both. Creditors cannot, at one moment, take steps in recognition of the assignment and in the line of its strict enforcement according to its terms, and seek to hold the assignee to its performance, and in the next, repudiate it as fraudulent and void (*Cavanagh v. Morrow*, 67 *How. Pr.* 241, 245; *Rapalee v. Stewart*, 27 *N. Y.* 310, 313).

It is an elementary rule that creditors receiving a benefit under an assignment become parties to it and are estopped from afterward impeaching it (*Adlum v. Yard*, 1 *Rawle*, 163; *Burrows v. Alter*, 7 *Mo.* 424; *Rapelee v. Stewart*, 27 *N. Y.* 311; *Lanahan v. Latrobe*, 7 *Md.* 268; *Richard v. White*, 7 *Minn.* 345; *Scott v. Edes*, 3 *Id.* 377; *Valentine v. Decker*, 43 *Md.* 583; *Doub v. Barnes*, 1 *Md. Ch.* 127; *Therason v. Hickok*, 37 *Vt.* 454). Creditors having once made an election are concluded by it (*Rodermund v. Clark*, 46 *N. Y.* 354), and cannot revoke it (*Cavanagh v. Morrow*, *supra*; *Moller v. Tuska*, 87 *N. Y.* 166).

The plaintiff herein is barred from attacking the assignment. It is good so far as he is concerned, and whatever property the debtor had has gone to the assignee, to be administered according to his trust. The judgment creditor must, therefore, be limited to after-acquired property, and the order declining to so limit the examination must be reversed, with costs.

HYATT and EHRLICH, JJ., concurred.

Corn Exchange Bank v. Blye.

THE CORN EXCHANGE BANK, APPELLANT, v.
 BLYE, AS RECEIVER, ETC., OF THE MIDDLETOWN
 NATIONAL BANK, RESPONDENT.

SUPREME COURT, FIRST DEPARTMENT, GENERAL
 TERM, MARCH, 1886.

ALSO, COURT OF APPEALS, APRIL, 1886.

§§ 730, 1694, 1703, 1704, 1717.

*Replevin— Chattels replevied, when may be retaken after judgment
 against defendant—Objections to undertaking,
 when raised—Amendment.*

The defendant in an action of replevin may complete an undertaking to retake chattels replevied, by the justification of the sureties therein, after judgment against him, where notice of justification was given before judgment, and the proceedings on the judgment are stayed and an appeal taken therefrom.^[1, 3, 5]

Where the defendant in an action to recover chattels, which had been replevied, gave an undertaking to retake the same, within the time allowed by law, and also gave notice of the justification of the sureties therein, and the action was tried and judgment rendered in favor of the plaintiff before the sureties justified, but the plaintiff's proceedings to enforce it were stayed, and an appeal taken therefrom,—*Held*, that the defendant was entitled to perfect the undertaking and retake the chattel, notwithstanding the recovery of judgment against him;^[1, 5] that the conditions of the undertaking did not become fixed and determined until the final determination of the action, and this could not be until the appeal was disposed of;^[3] that the defendant only became bound to deliver the chattels recovered when the plaintiff had a right to enforce the judgment, and this right he did not have pending the appeal;^[3, 5] that upon the judgment being finally affirmed upon appeal, the liability of the sureties would become fixed and determined, and the delivery of the chattels would be finally adjudged;^[6] and that in the meantime the proceedings had for the justification of the sureties before judgment entered, could be completed.^[5]

In such a case, where the plaintiff moved to set aside the undertaking,

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etc., and procured a stay of defendant's proceedings until the determination thereof,—*Held*, that there was no sufficient reason for setting the undertaking aside because it was not in conformity with the Code of Civil Procedure;[⁴,⁷] that such objection would properly arise upon the application for the allowance of the undertaking, and if at that time the objection was deemed valid by the judge, it could be amended;[⁷] that ample provision was made for amending the undertaking in furtherance of justice;[⁴,⁶] also *Held*, that the stay of defendant's proceedings which prevented the perfecting of the undertaking, became vacated when the motion was denied.[²,⁶]

(*Decided at general term, March 5, 1886; in the court of appeals, April 27, 1886.*)

Appeal to the general term of the supreme court, first department, from an order of the special term, denying the plaintiff's motion to vacate and set aside an undertaking given by defendant to retake chattels replevied in the action, and the notice of justification of the sureties therein.

The action was brought against the defendant as receiver of the Middletown National Bank, to recover fifty bonds of the West Point Manufacturing Company and two certificates stock of the Western Elevator Company of Indianapolis, Indiana.

At the time of the commencement of the action, the plaintiff issued a requisition to the Sheriff of Orange county to obtain the delivery of this property to it. This requisition was not executed by the sheriff until October 31, 1885, when he took from the defendant forty-six of these bonds. After such taking the defendant served upon the sheriff a notice requiring the return of the chattels to him; an affidavit alleging that he was the owner thereof and entitled to the same, and an undertaking to procure such return. This undertaking was dated October 28, 1885, and acknowledged on October 30, 1885, and recited that the

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plaintiff claimed the delivery of the chattels described in the complaint in the action and had caused the same to be replevied by the sheriff in the action, and that the defendant required their return to him. Within the time required by the statute, notice of the justification of the sureties named in this undertaking was served upon the plaintiff's attorney returnable November 9. On November 5, the action was tried and judgment rendered in favor of the plaintiff. After the entry of the judgment the plaintiff procured an order to show cause why this undertaking and notice of justification of the sureties should not be set aside upon the grounds: (1) that the recitals in the undertaking were untrue, and (2) because, by the entry of the judgment in favor of the plaintiff, the condition of the undertaking had become fixed and determined.

On the return day of this order it was shown on part of the defendant that the undertaking, although executed prior to the time when the chattels were taken by the sheriff, was not in fact delivered to him until after the chattels had been replevied and while they were in his possession, and further, that a stay of all the plaintiff's proceedings under this judgment was then existing and then in force which had been granted by the justice before whom the case was tried, to enable a defendant to perfect an appeal from the judgment, and that an appeal was then pending and undetermined. The motion was denied, and the plaintiff appealed to the general term.

L. A. Gould, for plaintiff appellant.

William Vanamee, for defendant-respondent.

BRADY, J.—The defendant availed himself of the advantages secured by section 1704 of the Code, and

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gave an undertaking as prescribed, to secure the continued possession of the property which the plaintiff designed to obtain by the commencement of this action under the provisions relating thereto, contained in title 2, article 1st, chapter 14, of the Code. The notice of justification by the defendant's sureties required to be given by the section was duly served, but before the day for that ceremony, the action was tried and verdict rendered and judgment entered for the plaintiff.

These incidents were thought to supersede the defendant's proceedings and to render the undertaking useless, and if that might be so declared under circumstances warranting such a result, it would not be proper herein for the reason that a stay of the plaintiff's proceedings was granted and the defendant had appealed; thus placing the plaintiff's recovery in abeyance and leaving the final result undetermined. When the plaintiff obtained the order to show cause why the defendant's undertaking should not be set aside, he asked for and was given a stay of ['] defendant's proceedings and thus prevented the defendant from perfecting the undertaking. When the motion to vacate or set aside the undertaking was denied, the stay mentioned was vacated. The position of the parties toward each other then was that the defendant had by undertaking, interposed a ['] barrier to the plaintiff's immediate possession of the property sought, and the plaintiff had a judgment before the undertaking had become a finality by the justification of the sureties as required by section 1704 referred to. But this judgment had no immediate force, by reason of the stay granted, and this ['] enabled the defendant to perfect his proceedings upon the undertaking and the appeal. What would be the effect if no stay had existed it is not necessary to consider, nor is it necessary to determine

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now whether the defendant's undertaking was in ['] all respects in absolute conformity to the Code, for the reason that ample provision is made for amendments in such procedures which the court may allow in furtherance of justice (See *Dinkle v. Wehle*, 67 *How. Pr.* 36, cited by the appellant; *Code Civ. Pro.* § 730; *Irwin v. Judd*, 20 *Hun*, 562).

The learned judge below no doubt disposed of this motion on the proposition that the plaintiff had not secured the right to enforce the judgment obtained and could not therefore cut off the defendant's rights initiated by the proceeding under the section of the Code already mentioned.

For these reasons, the order made below should be affirmed, with \$10 costs and disbursements, but to abide the event.

DANIELS, J., concurred.

From the order entered on this determination the plaintiff appealed to the court of appeals.

L. A. Gould, for plaintiff-appellant.

That a proceeding to replevy a chattel or to reclaim a chattel repleived must be invoked and perfected, if at all, before judgment, is evident from the provisions of the statute.

By the terms of section 1694 of the Code of Civil Procedure, plaintiff must issue the requisition before service of an answer, or, if judgment is to be entered by default, before the entry of the judgment; the defendant (§§ 1703 and 1704), within three days after the chattel is replevied, must require a return of the chattel or except to the sufficiency of plaintiff's sureties; and it is further expressly provided (§ 1717), that plaintiff's affidavit with the accompanying requisition,

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which is the foundation of the entire proceeding, must be made part of the judgment-roll in the action.

This latter provision, it is submitted, very clearly indicates that the entire proceeding to replevy a chattel must be terminated upon the rendition and entry of judgment. . . . It is equally clear that the undertaking given in behalf of the defendant does not become effectual until the justification of the sureties therein named and the allowance thereof by the court. No notice of exception to these sureties is required; but it is made obligatory upon defendant (§ 1704), to give notice of and procure a justification of these or other sureties, and until that is done (§ 1706), defendant cannot have a return of the chattels, and if such justification fails, the entire proceeding on the part of defendant to reclaim the chattels falls to the ground. The right, however, of the defendant to the delivery of the property to him was dependent on the justification (of his sureties), upon notice. *Grant v. Booth*, 21 *How. Pr.* 355; *Graham v. Wells*, 18 *Id.* 376. . . . The appeal from the judgment taken by the defendant, and the stay of execution thereon is no legal answer to the motion. . . . An appeal from a judgment restraining action on part of the defendant and a stay of proceedings thereon does not affect the validity or effect of the judgment pending the appeal; defendant is not absolved from the duty of obedience to it, or permitted to do that which the judgment absolutely prohibits. *Sixth Ave. R. R. Co. v. Gilbert E. R. R. Co.*, 71 *N. Y.* 430. . . . The order is appealable to the court of appeals. The order appealed from was made in the action after judgment, and it clearly affected a substantial right. . . . Citing *Wright v. Rowland*, 4 *Keyes*, 166; *Plimpton v. Bigelow*, 93 *N. Y.* 592, 602, and cases cited; *Foote v. Lathrop*, 41 *Id.* 358; *Tracy v. First Nat. Bank*, 37 *Id.* 523; *Leland v.*

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Hathorne, 9 *Abb. Pr. N. S.* 97; Kain v. Delano, 11 *Id.* 29; Tallman v. Hinmann, 10 *How. Pr.* 89.

Elihu Root (*William Vanamee*, attorney), for defendant-respondent.

The order is not appealable. The granting or denial of the motion was not a matter of legal right. It was a mere question of practice. The effect of the stay granted by the court, and the propriety of granting the relief asked for by the plaintiff upon the alleged inaccuracy of the undertaking were matters within the discretion of the court below, and, no abuse of such discretion being shown, it is well settled that this court will not entertain the appeal. *Howell v. Mills*, 53 *N. Y.* 322; *Lawrence v. Farley*, 73 *Id.* 187. The condition of the undertaking did not become fixed and determined until the final determination of the action.

There could be no final determination until the appeal from the judgment had been disposed of. *Ball v. Gardner*, 21 *Wend.* 270; *Bennett v. Brown*, 20 *N. Y.* 99.

It was no ground for setting the undertaking aside that it was not in absolute conformity with the provisions of the Code. The proper time to raise such objections is upon the application for the allowance of the undertaking, and if the court then considered the objections valid, it would have the right to allow amendments to the respects complained of. *Code Civ. Pro.* § 730.

PER CURIAM.—The plaintiff brought an action to recover certain bonds of the defendant, and caused to be executed and delivered to the sheriff a proper undertaking and requisition to take possession of the same pending the action. On November 5, 1885, the cause came on for trial and a verdict was directed in

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favor of the plaintiff, and a judgment entered thereon, which judgment, together with the notice of entry, was duly served upon defendant, November 7, 1885. The defendant served an undertaking to reclaim the bonds with notice of justification on November 9, 1885, two days after entry of judgment. Plaintiff moved to set aside the defendant's undertaking and obtained a stay of proceedings. Pending the motion to set aside the undertaking and before the hearing thereon, an appeal from the judgment was taken by the defendant. The motion, when heard by the special term, was denied, and, according to the opinion of the general term, it was disposed of upon the ground that the plaintiff had not secured the right to enforce the judgment obtained and could not therefore cut off the defendant's rights, initiated by the proceedings under section 1704 of the Code of Civil Procedure.

The appellant claims that there is no right in the defendant to reclaim chattels after a trial of the action upon the merits, and the entry of a judgment against defendant which adjudges the delivery and possession of the chattels to the plaintiff, and it relies upon certain provisions of the Code relating to the subject, viz. : sections 1694, 1703, 1704, 1717.

The answer to this position is that the condition of the undertaking did not become fixed and determined until final determination of the action, and this ['] could not be until the appeal had been disposed of. The defendant only became bound to deliver the chattels recovered when the plaintiff had a right to enforce judgment in its favor. This right did not exist as long as the appeal was pending. Upon the judgment being finally affirmed upon appeal, the contingency would happen upon which the liability of the sureties would be fixed and determined, and a delivery of the chattels would be finally adjudged. In the mean time the proceedings had for justification of

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the sureties before judgment was entered could be completed afterward, and before judgment was obtained, upon which the final liability of the sureties depended.

The failure of the sureties to justify, and the allowance of the undertaking was caused by the stay of proceedings granted on the order to show cause ['] why the undertaking should not be set aside, and the defendant was thus prevented from perfecting the undertaking. The stay mentioned became vacated when the motion was denied. If the defendant's undertaking, the perfecting of which had been stayed, was defective and insufficient, ample provision is made for amending it, which amendment may be allowed by the court in the furtherance of justice. It is not now necessary to determine how this should be done, as it is for the supreme court to regulate its own practice.

There is no sufficient reason for setting the undertaking aside upon the motion, because it is not in conformity with the provisions of the Code. Such objection would properly arise upon the application for the allowance of the undertaking, and if at that time the objections were deemed valid by the judge, it could be amended.

The opinion of the general term mainly covers all the questions raised.

The order should be affirmed.

All concurred, except ANDREWS, J., not voting.

Varnum v. Wheeler.

VARNUM v. WHEELER.

SUPREME COURT, FOURTH DEPARTMENT, JEFFERSON
COUNTY, SPECIAL TERM, JUNE, 1886.

§ 3256.

Disbursements—When costs of copy of stenographer's minutes taxable as a necessary disbursement—When cost of copies of map annexed to case on appeal not allowed.

The only papers which can be used on the hearing of a motion for a new taxation of costs are those which were presented to the clerk, and passed upon by him upon the taxation.^[1]

Where it is necessary for a party to provide himself with a copy of the stenographer's minutes of the evidence and proceedings upon a trial to enable him to make a case or bill of exceptions, the legal expense incurred in procuring the same properly forms an item in the bill of costs, and is taxable as a necessary disbursement incurred in the prosecution or defense of the action, as the case may be.^[2, 3]

The reasons why stenographer's fees in such a case are a necessary disbursement, and taxable as such, stated.^[2]

A stenographer is not legally known in judicial proceedings, except as an officer of the court, acting under its direction, and subject to its control;^[4] on a trial at circuit the stenographer is such an officer, and acts in his official capacity,^[5] but on a trial before a referee, the employment is by the party or parties for his or their accommodation simply, and therefore it seems his fees are not taxable on a trial before a referee, unless it is so stipulated.^[6]

Where the successful party to an action sought, on the adjustment of costs, to tax the cost of procuring copies of a map attached to the case on appeal from a prior judgment in the action, he being entitled to the costs of such appeal, and it did not appear that the original map had been put in evidence on the first trial,—*Held*, that the cost of procuring copies thereof could not be taxed as a necessary disbursement.^[8]

(Decided June 15, 1886.)

Motion by the defendant for a new taxation of costs, made for the purpose of reviewing a taxation thereof made by the clerk of Jefferson county.

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The case was originally tried at the circuit, and plaintiff non-suited. On an appeal to the general term a new trial was granted. Upon the second trial the plaintiff succeeded. There was included in the bill of costs presented for taxation two items, as follows: Paid for stenographer's minutes, \$90.00; for copies of maps to attach to case, \$10.00.

These were objected to by the defendant as not properly taxable. They were, notwithstanding, taxed by the clerk as necessary disbursements. The defendant appealed, and upon the argument challenges the allowance of said items alone.

The only papers used before the clerk were those furnished by the plaintiff, among which was an affidavit of disbursements incurred by her in the usual form; and in addition, that it was necessary for the plaintiff to procure the stenographer's minutes taken on the first trial, to enable her to make the case for appeal, and for that purpose she did so procure them; that the cost thereof was \$90.00, paid to the official reporter, and which was a reasonable and proper charge therefor.

James A. Ward, for the defendant and motion.

John C. McCartin, for plaintiff, opposed.

['] KENNEDY, J.—The only papers which can be used on the hearing of this motion, are those which were presented to the clerk, and passed upon by him upon the taxation (*Remington Paper Co. v. O'Brien*, 18 *N. Y. Weekly Dig.* 209; *Logan v. Thomas*, 11 *How. Pr.* 160).

The Code provides that a party to whom costs are to be awarded in an action is entitled to include his necessary disbursements, and defines the character of the same; then follows this general provision: "And

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such other reasonable and necessary expenses as are taxable according to the course and practice of the court, or by express provision of law" (§ 3256).

['] When a party intends to appeal from a judgment rendered after the trial of an issue of fact, he must, except as otherwise prescribed by law, make a case and procure the same to be settled (*Code of Civil Procedure*, § 997). The case so made must be a correct transcript of the proceeding upon the trial (*Carter v. Beckwith*, 82 *N. Y.* 83). The notes of an official stenographer or assistant stenographer, taken at a trial, when written out at length, may be treated in the discretion of the judge as the minutes of the judge, for the purpose of the article of which section 997 forms a part (*Code*, § 1007). Where a case is made presenting exceptions to finding of fact, it should show that it contains all the evidence bearing upon the exception (*Beard v. Yates*, 1 *Supm. C. Rpts.* [*T. & C.*] addenda, 21). And in the absence of this showing, it will be presumed that the evidence upon the trial was sufficient to sustain the finding (*Perkins v. Hill*, 59 *N. Y.* 87; *Galzell v. Raw*, 1 *Supm. C. Rpts.* [*T. & C.*] addenda, 4; *West v. Fargo*, 6 *Lans.* 325).

['] The affidavit shows that it was necessary to enable the plaintiff to make the case for the purpose of appeal, that she should procure the minutes of the official stenographer to be written out. This is not disputed by the appellant, and must therefore be taken as true.

Each stenographer specified in the act providing for his appointment, must, under the direction of the judge presiding at or holding the term, or sitting at which he attends, take full stenographic notes of the testimony and all other proceedings in each case tried, &c. (*Code*, § 83). Section 84 provides for a preservation of the minutes. Section 86 requires the stenographer to furnish to either party demanding it, upon

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being paid therefor, a copy of the minutes so taken by him.

['] A stenographer is not legally known in judicial proceedings, except as an officer of the court acting under its direction, and subject to its control; hence the cases holding that the expense to a party for a copy of the minutes kept by him, in a trial before a referee or other party where his services are invoked, are not taxable as a necessary disbursement, are not applicable to the case in hand. The employment being by the party or parties for his or their accommodation simply, and therefore a personal charge against the employer; and unless so stipulated, such expense cannot be taxed as a necessary disbursement (*Mark v. The City of Buffalo*, 86 *N. Y.* 401; *Rust v. Hauselt*, 2 *N. Y. Monthly Law Bul.* 6).

['] The rule in reference to a trial had at the circuit is different. There the stenographer is an officer of the court, and acts in an official capacity. The only minutes kept in full are necessarily kept by him. The dispatch of business requires this, and a party cannot make a case or propose amendments without a copy of his minutes written out. The judge upon settling the case, cannot, in many instances, without the aid of the minutes, properly determine controverted questions. And unless the expenses legally incurred in obtaining them are to be regarded as a necessary disbursement, the burden incident thereto must be thrown on the party procuring them, whether successful in the action or not.

It has been held that a party procuring these minutes for the purpose of proposing amendments to a case, may, if successful, include the bill in his bill of costs (*Sibley v. Nichols*, 38 *How. Pr.* 182).

On the argument, the defendant's attorneys conceded the rule thus far.

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It has also been held at special term, that the expense of a copy of the stenographer's minutes taken on a former trial, obtained for use on the second trial of the same action, if obtained in good faith, is taxable as a disbursement, and part of the costs of the prevailing party (*Flood v. Moore*, 2 *Abb. N. C.* 91).

While not called upon to go to the extent this case does in the one now here, I am constrained to hold in the light of the present practice in the trial of causes at the circuit, and that applicable to the preparation and settlement of a case upon appeal, that where it is necessary for a party to provide himself with a [] copy of the stenographer's minutes of the evidence and proceedings upon the trial, to enable him to make a case or bill of exceptions, that the legal expense incurred in procuring the same properly forms an item in the bill of costs, and is taxable as a necessary disbursement incurred in the prosecution or defense of the action, as the case may be.

The clerk committed no error, therefore, in taxing the \$90 item.

I have carefully examined the very elaborate brief of the appellant's attorney and the authorities cited, but find nothing in conflict with the foregoing conclusion.

[*] The affidavits presented on the taxation do not show that the original of the map, copies of which are attached to the case, was put in evidence upon the trial. Without determining whether an item of this character should be allowed on taxation as a necessary disbursement in a proper case, there was no evidence before the clerk that justified its allowance.

The item of \$10 is, therefore, disallowed.

With this correction, the bill of costs as taxed to stand.

An order will be entered pursuant to the foregoing decision, but without costs to either party.

De Silva v. Flynn.

DE SILVA v. FLYNN, ET AL.

SUPREME COURT, FOURTH DEPARTMENT, CHEMUNG
COUNTY CIRCUIT, JANUARY, 1886.

§ 1501.

Adverse possession—When avoids deed—When ejectment action need not be brought in name of owner's grantor—When equitable title no defense in action of ejectment—When person whose lands are sold under execution becomes tenant at sufferance.

It seems, that a grantee of land held adversely to the grantor at the time of the conveyance, can only maintain an action in the name of such grantor.[¹]

The fact that one in possession of lands at the time of a conveyance thereof asserted a claim thereto adverse to the grantor, does not render the deed void unless he claimed under an adverse title.[²] A mere claim even of general ownership is not enough to avoid the deed; [³] the claim must be under some specific title, [³] which may be bad, but must have a definite and certain name, and be one of the means allowed by law for acquiring the ownership of real property.[⁴]

Where real property of one F. was sold to one R. under an execution against the property of F., and thereafter conveyed by R. to one S., who brought an action of ejectment to recover such property from F., who had remained in possession thereof notwithstanding the sale and claimed to own it,—*Held*, that F.'s possession was not under a title adverse to R., [⁵] and therefore did not render the deed from him to S. void, and S. could maintain the action in his own name; that F. had no title to the property, but had only naked possession thereof as a tenant at sufferance; [⁶] that the purchaser at the sheriff's sale took all F.'s rights, and thereupon the relation of landlord and tenant existed between such purchaser and himself, and he was subject to removal as a tenant holding over after the expiration of his term.[⁷] and thenceforth he had no title to claim under and his possession was not adverse, but became the possession of the purchaser, and he was estopped from denying it.[⁸]

In such a case, *Held*, that an allegation in the answer that the premises "equitably belong" to F.'s children by his first wife, and that

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“any title which he may have is for their use and benefit,” in the absence of any assertion or description of any specific title is of no avail; [⁹] that an equitable title could not prevail against the legal title. [¹⁰]

Jackson *ex dem.* Schofield v. Collins (3 Cow. 89); [¹¹] Sayres v. Rathbone (8 Abb. N. S. 277); [¹²] Chalmers v. Wright (5 Robt. 713); [¹³] followed.

(Decided January 5, 1886.)

Motion by plaintiff for judgment on a verdict in his favor ordered by the court, and by the defendants for a non-suit notwithstanding the verdict.

The opinion stated the facts.

Youmans, Moss & Knipp, for plaintiff.

John Murray, for defendants.

VANN, J.—This is an action of ejectment brought to recover the possession of certain lands situate in the third ward of the city of Elmira. The plaintiff claims title by virtue of a conveyance from one Robertson on August 6, 1884. The title of said Robertson was through a deed from the sheriff of Chemung county, dated December 4, 1879, and executed to carry into effect a sale of the real estate in question, under an execution out of the county court of said county, against the property of the defendant, Patrick Flynn.

Said Flynn was in possession of the premises personally, and through the other defendants, his tenants, on August 6, 1884, when Robertson conveyed to the plaintiff, and on August 8, 1884, when this action was commenced, claiming title and the right of possession. He had acquired the title in fee on February 14, 1876, by deed from one Harmon, and he was not shown to have even parted with it except by means of the sale

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of the sheriff, or to have ever had any other title.

[¹] It is claimed by the learned counsel for the defendants that the plaintiff is the grantee of lands held adversely to his grantor, and that hence this action can only be maintained in the name of such grantor.

This position is sound, provided the lands were held adversely at the time that the plaintiff acquired title (3 *R. S.* [7th ed.] p. 2196, § 147;* *Code of Civil Pro.* § 1501†).

The Revised Statutes provide that "every grant of lands shall be absolutely void, if at the time of the delivery thereof, such lands shall be in the actual possession of a person claiming under a title adverse to that of the grantor" (p. 2196, § 147).

The defendant, Flynn, was in actual possession of the lands in question, at the time of the conveyance from Robertson to the plaintiff, but he did not claim under a title adverse to that of Robertson.

[²] The fact that, being in possession, Flynn asserted an adverse claim, would not render the deed void. Unless he claimed under an adverse title, the deed would be valid. A mere claim is not

[³] enough, even if it is a claim of general ownership.

The claim must be under some specific title (*Orary v. Goodman*, 22 *N. Y.* 170; *Fish v. Fish*, 39 *Barb.* 513).

[⁴] The title may be bad, but it must have a definite and certain name, and must be one of the means allowed by law for acquiring the ownership of real property (*Chalmers v. Wright*, 5 *Robt.* 713; *Jackson ex dem. Dunbar v. Todd*, 2 *Caines*, 182). The only specific title under which Flynn claimed was the conveyance from Harmon.

[⁵] That title, however, was not adverse to that

* 1 *R. S.* 734, § 147.† *Code of Procedure*, § 111.

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of the plaintiff's grantor. It was the same title. Both Flynn and Robertson claimed the same title and under the same persons. It became vested in Flynn upon delivery of the Harmon deed to him, and subsequently, by operation of law through judicial sale, passed to the grantor of the plaintiff.

[*] Thereafter Flynn had no title, he had only naked possession. He became a mere tenant at sufferance. The purchaser at the sheriff's sale took all his rights, and thereupon the relation of land-

['] lord and tenant existed between such purchaser and himself, and he was subject to removal as a tenant, holding over after the expiration of his term (*People ex rel. Higgins v. McAdam*, 84 *N. Y.* 287; 2 *R. S.* 513, § 28; *Laws of 1879*, ch. 101; *Code of Civil Pro.* § 2232; *Jackson v. Graham*, 3 *Caines*, 188). Thenceforth he had no title to claim under. Even his

possession was not adverse, for it had become the possession of the purchaser, and he was estopped from denying it.

[*] The allegation in the answer that the premises "equitably belong" to the children of defendant, Flynn, by his first wife and that "any title which he may have is for their use and benefit," is of no avail, because there is no assertion or description of any specific title and nothing to show how or why the premises "equitably belong" to the children. No

proof was made of any equitable title, and even if [10] there had been, it could not have prevailed against the legal estate (*Jackson ex dem. Potter v. Sisson*, 2 *Johns. Cas.* 321; *Jackson ex dem. White v. Carey*, 16 *Johns.* 302; *Sinclair v. Jackson ex dem. Field*, 8 *Cow.* 543).

Independent of this reasoning, the following cases, decided under circumstances quite analogous in principle to those under consideration, are regarded as controlling upon this question.

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[¹] In Jackson *ex dem.* Schofield v. Collins (3 Cow. 89), it was held that one claiming under a deed from a judgment debtor has not such an adverse possession as will avoid a conveyance executed by a purchaser under an execution upon the judgment.

[²] In Sayres v. Rathbone (9 Abb. N. S. 277), it was held that where certain devisees gave a mortgage upon the lands devised to them, which was subsequently foreclosed and the premises sold under the decree, the possession of the devisees was not under claim of title adverse to that of the purchaser at the mortgage sale; and that such purchaser's conveyance of the premises, notwithstanding the possession of the devisees, was not avoided by the statute.

The court said: "The defendant, it is true, held adversely to the claim of the plaintiff, and claimed title herself under said will; but she did not hold or claim under *a title* adverse to that of plaintiff."

[³] In Chalmers v. Wright (5 Robt. 713), it was held that the *title* which a possessor of lands must claim in order to avoid the deed of an owner out of possession, must arise from a written instrument, professing on its face, or agreeing to convey some title or interest in the land in question, executed by some person holding adversely, who therein assumes to have the legal title to convey, and which is actually binding upon such person, or else from a judgment, decree or executed process of some court.

The variance between the judgment, transcript and execution, and the recitals in the certificate of sale, could injure no one, and is not such an irregularity as should invalidate the title derived under the sheriff's sale (Jackson v. Rosevelt, 13 Johns. 97; Jackson v. Davis, 18 Johns. 7; Jackson v. Bartlett, 8 Johns. 361).

The defendant's motion is denied, and judgment is ordered on the verdict in favor of the plaintiff, with \$10 costs.

Lewisohn v. Neiderweisen.

LEWISOHN, RESPONDENT, v. NEIDERWEISEN,
APPELLANT.

SUPREME COURT, FIRST DEPARTMENT, GENERAL
TERM, JUNE, 1886.

§ 1353.

Case on appeal—Certificate to.

Where a case on appeal was not certified as required by section 1353 of the Code of Civil Procedure,—*Held*, that this was sufficient to prevent the consideration of the case, and that it should be sent back to be properly certified; that the object of the section is undoubtedly for the purpose of securing the presentation to the appellate court of the entire proceedings sought to be reviewed, and the observance of the duty imposed thereby, is extremely important.

(Decided June 1, 1886.)

Appeal by defendant from judgment in favor of plaintiff.

The opinion states the material facts.

J. E. Newberger, for defendant-appellant.

Ira Leo Bamberger, for defendant-respondent.

PER CURIAM.—This case was submitted, and the first point taken by the respondent is that the appeal book has not been certified as required by section 1353 of the Code of Civil Procedure. This objection we regard as valid, and the effect of it is to prevent the consideration of the case.

Sears v. Sears.

We refrain from any consideration of the merits and send the case back to be properly certified. The observance of the duty imposed by section 1353 is regarded as extremely important. The object of the section is undoubtedly for the purpose of securing the presentation to the appellate court of the entire proceedings sought to be reviewed.

Case sent back to be properly certified.

BRADY, P. J., DANIELS and MACOMBER, JJ., concurred.

SEARS v. SEARS.

SUPREME COURT, FIRST DEPARTMENT, NEW YORK
COUNTY, SPECIAL TERM, JUNE, 1886.

§§ 723, 1774.

*Divorce—Amendment of summons in action for—Power of court to allow
—Summons, when not void because it omits notice
of what action is for.*

Where the original summons in an action of divorce had indorsed on the face thereof a notice of what the action was brought for, as required by section 1774 of the Code of Civil Procedure, but the copy of the summons served did not have such notice thereon,—*Held*, that the omission did not render the summons a nullity, but the court could allow an amendment thereof; also *Held*, that the omission did not prevent an application for alimony in the action or invalidate an order of arrest granted therein, but merely prevented the entry of judgment by default.

(Decided June 14, 1886.)

Motion by plaintiff that summons be amended.

Sears v. Sears.

This action was brought for divorce. A copy of the complaint was not served with the summons. The original summons had upon its face an indorsement as required by section 1773 of the Code of Civil Procedure, stating that the action was for divorce, but the copy thereof served on the defendant did not have such notice thereon.

ANDREWS, J.—The stipulation required of the defendant as a condition of ordering a reference not having been given, the motion to punish plaintiff's attorney for contempt will be denied, with \$10 costs. The question raised by the motion to amend the summons appears to be a new one, and is not free from difficulty. In view of the full and explicit notice indorsed upon the summons, and of the opportunities of defending the action which have been offered to the defendant, there can be no doubt that the plaintiff's attorney intended that the defendant should know, the moment she was served with the summons, that such service was meant to be the commencement of an action for a divorce. Moreover, it is admitted that she did have that knowledge, but refrained from appearing to defend the action because she was advised by her attorney that the summons was a nullity, for the reason that the notice was not in the form required by the statute.

Under these circumstances, it is the duty of the court to allow the amendment, if it has the power to do so.

Section 723 of the Code authorizes the amendment of any process issued in an action, and such authority is given in general terms, no exception being made of process issued in actions for a divorce. The language of the section is certainly broad enough to authorize the amendment asked for, unless there is something

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in section 1774 which deprives the court of the power which it would otherwise have under section 723.

Section 1774 does not declare that a summons which does not contain the proper notice upon its face shall be a nullity, but only that judgment shall not be rendered by default unless the copy served contains the notice presented by the section. The power of the court to allow amendments given by section 723 is to be exercised "in furtherance of justice," and in some cases it might work great injustice to the plaintiff if a mistake of this kind could not be corrected; while I do not see how a defendant could ever be prejudiced if it is held that the power to correct such a mistake exists.

For instance, a plaintiff having a most meritorious case, might commence an action of divorce, and, through inadvertence, the copy summons served might not contain a notice in the form prescribed by the statute, nor any notice at all, and before the mistake should be discovered, the five years' limitation fixed by subdivision 3 of section 1758 of the Code might run, and the right to bring a new action be wholly lost. Whereas, if the copy summons served does not contain upon its face the words which the statute requires, and the defendant, in ignorance of the nature of the action, or intentionally, as in the present case, does not appear, no judgment of divorce can be obtained, nor can the rights of the defendant be prejudiced until the mistake is corrected.

It is not necessary for the purposes of the present motion to decide what proceedings can be lawfully taken in such a case, but I see nothing in said section 1774 to prevent an application for alimony and counsel fee, nor which would invalidate an order of arrest, even if the copy summons served did not contain the proper notice.

Upon familiar principles sections 723 and 1774 must

Estate of Place.

be read together, and, if possible, effect must be given to all the provisions of both, and it seems to me that the provision of the latter, that judgment shall not be rendered unless the copy summons served contains certain words upon its face, is not necessarily inconsistent with those of the former, which confer upon the court a general power to amend process. Upon the evidence before me, I must hold that the words "action for a divorce" were written upon the face of the original summons in this action, and that, through inadvertence, such words did not appear upon the face of the copy served, and that the motion for leave to now serve a copy containing those words, should be granted on payment of \$10 costs. The order will be settled before me in circuit, part 2, on two days' notice.

ESTATE OF SUSAN A. PLACE, DECEASED.

SURROGATE'S COURT, NEW YORK COUNTY, JUNE,
1886.

§§ 2643, 2693.

*Letters of administration cum testamento annexo—Who entitled to—
When conflicting interest of applicant's husband does not disqualify her.*

Where, at the time of the revocation of letters testamentary, the only unadministered asset of the decedent was a chose in action to recover on which an action had been brought by the late executor, and was then pending.—*Held*, that such claim was an unadministered asset of the estate, and that the surrogate had jurisdiction to appoint an administrator with the will annexed.^[1]

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Letters of administration *cum testamento annexo* can only be denied to one otherwise entitled thereto, for cause constituting a statutory disqualification.[³]

Where, on the application of the husband of a decedent, who was also a beneficiary under her will for letters of administration *cum testamento annexo*, or that they be issued to the public administrator, it appeared that of the three residuary legatees, H., P. and S., H., who claimed to be entitled to letters, was the wife of the person against whom there was a claim in favor of the estate, on which an action was pending which constituted the only asset unadministered; that P. was an executor named in the will who had been removed, and that S. made no claim to letters,—*Held*, that H. was entitled to letters in preference to the petitioner;[²] that the fact that the only asset of the estate was a claim against her husband, did not disqualify her.[²]

Section 2693 of the Code of Civil Procedure,—which declares that the proceedings for procuring letters of administration or letters of administration *cum testamento annexo* for the successor of the original holder or holders of such letters, shall be the same as in a case of intestacy,—was not intended to change the order of priority established by section 2643 of that Code, but simply indicates the practice that must be followed by the person entitled to letters in order to obtain them.[^{4, 6, 7}]

Matter of Ward (1 *Redf.* 255);[^{5, 6, 7}] *Bradley v. Bradley* (3 *Id.* 512),[^{6, 7}] followed.

(*Decided June 9, 1886.*)

Application by the decedent's husband for letters of administration *cum testamento annexo*, etc.

The opinion states the material facts.

ROLLINS, S.—Of the three persons named by this testatrix as her executors, but two have ever taken letters testamentary, and the letters of those two have been revoked. The estate is now, therefore, without a legal representative. The husband of the testatrix, who is a beneficiary under her will, applies for letters of administration with the will annexed. He alleges

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in his petition that the only unadministered asset known to him is a chose in action, touching which there is now pending, in the superior court of the city of New York, a suit at law, wherein the late executor is plaintiff, and Mr. Hayward, the husband of one of the daughters of the testatrix, is defendant. The petitioner's application in his own behalf, and his suggestion that, if that application be denied, letters should issue to the public administrator, are opposed by Mrs. Hayward, who insists—

1st. That there is no occasion for making an appointment at all ; and,

2d. That if that contention is pronounced untenable, she is herself entitled to letters in preference both to the petitioner and the public administrator.

Section 2643 of the Code of Civil Procedure provides, among other things, that where, because of revocation of letters, there is no executor or administrator *cum testamento annexo* qualified to act, letters of administration *cum testamento annexo* shall issue as follows : “ *First*, to one or more of the residuary legatees,” &c. Mrs. Hayward is one of the residuary legatees under her mother's will ; the two others are her brother, Barker Place, the deposed executor, and her sister, Mrs. Sullivan. Mrs. Sullivan makes no claim to letters. Barker Place is of course disqualified.

[¹] *First*. I think that the claim for the establishment of which the removed executor was prosecuting an action at the time of the revocation of his letters, is an unadministered asset of the estate, and that the surrogate has jurisdiction, therefore, to appoint an administrator with the will annexed.

[²] *Second*. I am equally clear that Mrs. Hayward is entitled to letters in preference to the petitioner. The circumstance that the claim referred to is a cause of action against her husband, does not defeat her right

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of priority. It is not made a ground of disqualification by the statute, and only for cause that constitutes a statutory disqualification, can one who is otherwise entitled be denied letters (*Churchill v. Prescott*, 2 *Bradf.* 304; *Estate of Charles Morgan*, 8 *N. Y. Civ. Pro.* 77; *Emerson v. Bowers*, 14 *N. Y.* 449; *McGregor v. McGregor*, 3 *Abb. Ct. of App. Dec.* 92; *Coope v. Lowerre*, 1 *Barb. Ch.* 45; *O'Brien v. Neubert*, 3 *Dem.* 156).

['] Counsel for the petitioner claims that the provisions of section 2693 of the Code would justify the surrogate in granting his client's application. That section declares that the *proceedings* in procuring letters of administration or letters of administration *cum testamento annexo* for the successor of the original holder or holders of such letters, shall be "the same as in a case of intestacy." But this declaration is evidently not intended to change the order of priority established by section 2643; it simply indicates the practice which must be followed by the person entitled to letters in order to obtain their issuance.

A claim similar to that which is set up by this petitioner was urged upon Surrogate McVEAN in *Matter of Ward* (1 *Redf.* 255).

['] Section 45, title 2, chapter 6, part 6, part 2 of the Revised Statutes (3 Banks' 6th ed. 83),* provided that in case of the revocation of letters of all the executors or administrators of an estate, the surrogate should issue letters of administration "with the will annexed, or otherwise, as the case may be, to the widow, or next of kin, or creditors of the deceased, or others, in the same manner as hereinbefore directed in relation to original letters of administration."

Section 14 of the same title† established the order of priority to letters of administration with the will

* 2 R. S. 78, § 45.

† 2 R. S. 71, § 14.

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annexed. (That section was repealed by the Laws of 1880, chapter 245, and in its place has been substituted section 2643 of the Code.) Section 27 of the same title* established the order of priority to original letters of administration in cases of intestacy. (That section is still in force.)

['] It was held by Surrogate McVEAN, that section 45 (*supra*), should be construed as declaring that administration *cum testamento annexo* upon the estate of a decedent who had died testate, should in all cases be granted to applicants in the order of preference prescribed by section 14, and that administration *de bonis non* upon an intestate's estate should be granted in the order of preference prescribed by section 27. This interpretation was subsequently approved by Surrogate CALVIN, in *Bradley v. Bradley* (3 *Redf.* 512).

['] The cases above cited confirm me in the opinion that the provision in section 2693 of the Code (which has taken the place of section 45 [*supra*], of the Rev. Stat.), that in case of the death, incapacity, or removal of "all the executors or all the administrators to whom letters have been issued . . . the surrogate must grant letters of administration to their successors in like manner as if the former letters had not been issued," means that for ascertaining rights of preference, resort must be had in cases of testacy to section 2643 of the Code, and in cases of intestacy to section 27 (*supra*), of the Revised Statutes.

* 2 R. S. 74, § 27.

Beadleston v. Beadleston.

BEADLESTON, APPELLANT, v. BEADLESTON,
RESPONDENT.SUPREME COURT, FIRST DEPARTMENT, GENERAL
TERM, MARCH, 1886.

§ 1769.

*Counsel fees—When granted in action for divorce after adverse report—
Power for court to grant.*

There is no doubt of the power of the court prior to the entry of judgment in an action for divorce, to make an allowance for fees,[²] but after judgment has been entered it has no power to make an order requiring the husband to pay any sum to an attorney for services which he has theretofore or may thereafter render to the plaintiff or defendant in an action for or against the wife.[³]

The report of a referee in an action for divorce having been filed only, and no judgment having been entered thereon, the power of the court to make an allowance to the wife for counsel fees is unquestionable, and whether any sum shall be allowed is a matter of discretion.[⁴]

Example of a case in which an allowance for counsel fees was properly made to a wife who was the defendant in an action for divorce, after the referee had filed a report adverse to her, but upon which judgment had not yet been rendered.[^{1, 5}]

(Decided March 5, 1886.)

Appeal from an order granting to the defendant an additional allowance of \$3,500.

The opinion states sufficient facts.

Samuel Untermeyer, for plaintiff-appellant.

Dexter A. Hawkins (*Hawkins & Gedney*, attorneys), for defendant-respondent.

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BRADY, J.—This action was brought to procure an absolute divorce upon the ground of adultery. The defendant denied the adultery charged and set up the commission of adultery by the plaintiff. The cause was referred, and application was made for a counsel fee and alimony. Counsel asked for \$5,000 upon that application, but \$1,000 only was granted in addition to the sum allowed for alimony. As the reference proceeded, many witnesses were examined on either side, but the referee reported against the defendant, specifying her guilt with several persons, and the report was filed. An application was then made for a further counsel fee, and an order staying the plaintiff's proceedings was obtained, so that the motion could be heard before judgment was entered upon the report of the referee.

['] It is stated in the affidavit of J. Worden Gedney, the attorney for the plaintiff, that the attorneys and counsel for defendant have already expended in necessary expenses in defending this suit more than \$1,000 beyond the whole sum allowed, thus leaving them with nothing for their services, and on account of the poverty of the defendant, they have no means of recovering the amount of their expenses, unless there is a further allowance. And thus, it would seem, that payments of \$2,000 have actually been made in the defense of the action, and in the effort to establish the criminality of the plaintiff. There are serious denials of these allegations contained in the papers, and as to all the material facts and circumstances bearing upon the propriety of a further allowance, the contest may be regarded as in conflict. The affidavits *pro* and *con* are irreconcilable.

The learned judge who heard the motion disposed of it by saying that after a very careful consideration of the matter, he was of the opinion that the court had the power, and that it ought to make a further allow-

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ance, with a stay of the plaintiff's proceedings until it shall have been paid. And he seems to have been influenced very much by the fact that \$2,000 had been expended in necessary disbursements. Assuming this to be true, if the allowance of \$3,500 be made, then \$2,500 will be received for the professional services rendered.

[²] There is no doubt of the power of the court, prior to the entry of judgment, to make an allowance in an action like this (*Code*, § 1769, *McQuien v. McQuien*, 61 *How. Pr.* 280).

[³] Although after the judgment has been entered this court has no power to make an order requiring the husband to pay any sum to an attorney, for services which he has theretofore rendered or may thereafter render to the plaintiff or defendant in an action for or against the wife (*Winton v. Winton*, 31 *Hun.* 290).

[⁴] The report of the referee having been filed only, and no judgment having been entered upon it, the power of the court to make the order for an allowance must be regarded as unquestionable under the Code and the decisions affecting the subject in this State; and whether any sum shall be allowed is a matter of discretion.

[⁵] The defendant labored under the disadvantage—and it is quite a formidable one, it must be admitted—of having been found guilty of the acts of adultery charged; which entitled the plaintiff to a divorce, unless the report be set aside. But, nevertheless, until judgment is entered, she is entitled to the protection of the court, unless the evidence establishes the fact that her defense was not made in good faith, or her opposition to the action was distinguished by extraordinary and unjustifiable proceedings. As she is without means and the defendant has the ability to pay, the expenses incurred by her should be paid,

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and some compensation given to her counsel for their professional services in her behalf. The matter, as already suggested, is one of discretion, and the learned justice in the court below, in the exercise of that power, and after a very careful examination of the whole case, determined that some additional allowance should be granted. Upon an examination of the case, it is not very well understood how his conclusion can be interfered with. The record shows many circumstances favorable to the exercise of such a discretion, and perhaps many militating against it; but weighing them all together, as did the learned justice in the court below, the exercise of a discretion in favor of the defendant as to some allowance is an act which may not be interfered with without doing injustice. But it is thought that the learned justice, in awarding \$3,500, was under the impression that \$2,000 had been expended by the defendant and her counsel. But such is not the fact. Assuming that the sum of \$2,000 was expended, \$1,000 of it had been contributed by the defendant; and, therefore, if the amount of the allowance be reduced to \$2,500, the counsel fee will be \$1,500. This may not be as full a compensation as might be expected, but the plaintiff's success and the consequent established guilt of the defendant, must in equity affect the measure of compensation.

For this reason, the order must be modified by reducing the amount granted for additional allowance in the court below to \$2,500, and, as modified, affirmed, without costs to either party.

DANIELS, J., concurred.

Rosenwald v. Phenix Ins. Co.

ROSENWALD, ET AL., RESPONDENTS, v. THE PHENIX INSURANCE COMPANY, APPELLANT.

SUPREME COURT, FIRST DEPARTMENT, NEW YORK COUNTY, CHAMBERS, JULY, 1886.

§§ 579, 1327, 1335.

Undertaking on appeal—When surety sufficient—American Surety Company.

Where, upon the justification of a surety company, which was the surety upon an undertaking to stay execution of a judgment pending an appeal therefrom, it appeared that the company had a capital stock of \$552,259.42 paid in, and was liable on bonds given in action for the sum of \$5,000,000, and had full collateral security for loss thereon; that it was liable on bonds given for the fidelity of employees in the sum of \$12,000,000, and that the loss on such bonds did not exceed 12½ per cent. of the premium received,—*Held*, that the surety was sufficient, and the justification should be approved.*

(Decided July 12, 1886.)

* In Gregory, Respondent, v. New York, Lake Erie & Western Railroad Company, Appellant (*Supreme Court, First Department, New York County, Special Term, Decided June 22, 1886*), exactly the opposite conclusion was reached.

In that case the plaintiff recovered a judgment for \$5,536 against the defendant, who appealed and gave an undertaking, the surety on which was the American Surety Company. Its sufficiency being excepted to, that company, upon justification, showed substantially the same facts as to its sufficiency as it did in the case of Rosenwald v. Phenix Ins. Co., above reported. The plaintiff's attorney took the ground that the surety should be as amply sufficient as any private person, and that its possession of collateral security added no weight to its sufficiency.

Jacob Fromme, for plaintiff-respondent.*Abbett & Fuller*, and *Henry Schmidt*, for defendant-appellant.*Frederick F. Nugent*, for American Surety Co.

Judge VAN BRUNT held that the surety was insufficient, but did not file any written opinion.

Rosenwald v. Phenix Ins. Co.

Justification of surety on undertaking to stay execution pending appeal.

The plaintiff having recovered a judgment against the defendant for \$4,675.77, the latter appealed and gave an undertaking to stay execution pending the appeal, the surety on which was the American Surety Company, a corporation.

The plaintiff excepted to the sufficiency of this undertaking, and thereupon notice of justification was given. It appeared on the justification that the surety had a capital of \$552,259.42 paid in, and was liable on bonds and undertakings given in actions in the sum of \$5,000,000, and on bonds for the fidelity of employees and other persons holding positions of trust in the sum of \$12,000,000. It also appeared that the surety was fully secured against loss on the bond given in actions by collateral security, and that the percentage of losses on the other bonds did not exceed $12\frac{1}{2}$ per cent. of the premiums received for becoming surety thereon.

Townsend, Dyett & Einstein, for the plaintiff-respondent.

Cited *Gregory v. N. Y., Lake Erie & Western R. Co.* (Reported *ante*, p. 444, *note*).

George A. Black, for defendant-appellant.

Frederick F. Nugent, for American Surety Company.

BARRETT, J.—When it is considered that the company has full collateral security for all undertakings or court bonds, and when it is also considered that the percentage of losses on bonds given for the fidelity of persons holding positions of trust does not exceed $12\frac{1}{2}$ per cent. of the premium received, it would seem

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that the surety is sufficient. The same result follows even if 50 per cent. of the reserve premiums be taken as the measure of liability on such trust bonds.

Justification approved.

ABENDROTH v. DURANT, IMPLEADED, ETC.

SUPREME COURT, FIRST DEPARTMENT, NEW YORK
COUNTY, SPECIAL TERM, MAY, 1886.

§ 3238.

Costs to abide event—When defendant against whom a judgment is recovered is considered the successful party, and entitled to costs awarded to abide the event.

Where a judgment was reversed on appeal, with costs to abide the event, and on a subsequent trial the plaintiff recovered \$3,388.53 on nine causes of action; and the complaint was dismissed as to three alleged causes of action, and the defendant had a verdict in his favor on seven alleged causes of action, involving over \$35,000,—*Held*, that the defendant was the successful party, and was entitled to costs of the first trial and of the appeal.

First National Bank v. Fourth National Bank (84 N. Y. 469), followed; Union Trust Co. v. Whiton (17 Hun, 593; aff'd, 78 N. Y. 491), distinguished and not followed.

(Decided May 12, 1886.)

Motion for a new taxation of costs.

This action was brought to recover on sundry claims (assigned to the plaintiff), for goods sold and delivered; for work, labor and services performed; for rent of real property; and on several promissory notes, and accounts stated. The complaint set out nineteen separate causes of action, and the plaintiff had a verdict (by direction of the court) on nine of

• *Abendroth v. Durant.*

them for \$3,383.53. His complaint was dismissed as to three alleged causes of action, and as to seven others a verdict was directed in favor of the defendant. These ten causes of action, on which the plaintiff was thus defeated, involved over \$35,000. The judge before whom the cause was tried granted an extra allowance of 2½ per cent. on the recovery to the plaintiff, and an extra allowance of \$500 to the defendant. The defendant presented a bill of costs to the clerk for adjustment, in which was included the costs of a first trial, and of an appeal from a prior judgment which had been reversed by the general term, with costs to abide the event. The clerk allowed such costs, and the plaintiff thereupon made this motion.

Norwood & Coggeshall, for plaintiff and motion.

Arnoux, Ritch & Woodford, for defendant, opposed.

ANDREWS, J.—The plaintiff's contention is sustained by the decision in the *Union Trust Company v. Whiton* (17 *Hun*, 593; S. C., 78 *N. Y.* 491). But while the court of appeals in that case declined to interfere with the construction placed by the general term upon its own order, it subsequently held, in *First National Bank v. Fourth National Bank* (84 *N. Y.* 469), construing its own order, that where a judgment in favor of the plaintiff was reversed, and new trial ordered costs to abide event, plaintiff, having finally succeeded, was entitled to tax costs of appeal to the court of appeals; and the decisions of the special and general term holding the contrary view, were reversed. It seems clear, therefore, that the rule which the court of appeals intended to establish in cases like the present, is to be found in their decision in the last named case, and

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not in Union Trust Company *v.* Whiton; and this was the view taken by Judge BARRETT in *Comly v. Mayor* (1 *N. Y. Civ. Pro.* 306), although this decision was mainly placed upon the ground that the general term had directed the "costs of this appeal to abide the event," which was a phraseology different from that used in the other cases above named. I cannot hold that the defendants were not successful when the plaintiff recovered only \$3,338.53, and was defeated on several alleged causes of action, amounting to over \$35,000, and when an extra allowance of \$500 had been made to them by Judge VAN BRUNT upon the ground that they, as well as the plaintiff, were successful.

The motion for a retaxation must be denied, with \$10 costs.

ESTATE OF ALEXANDER F. STERLING, DECEASED.

SURROGATE'S COURT, NEW YORK COUNTY, JULY, 1886.

§§ 2602, 2636, 2638, 2685.

Executor—When not removed on account of non-residence—When non-residence does not disqualify—When executor excluded from management of estate.

Where a petition for the removal of executors on the ground that their circumstances were such that they did not afford adequate security for the due administration of the estate, the petition merely alleged them to be "men of inconsiderable means, not themselves transacting any business or having any place of business,"—*Held*, that this was not enough to justify the revocation of the letters testamentary issued to them.^[1]

In the absence of opposition, letters testamentary may properly be issued to a non-resident of the State without the giving of a bond,^[2] and where they have been so issued, they cannot be revoked because of his continued non-residence, nor can any bond be for that cause required of him.^[4, 5]

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Where one of the persons named in a will as executors thereof was a stockholder of a foreign corporation, and its treasurer, and a member of its board of directors, and another person named in such will as executor was the cashier of said corporation, and both of them were personally engaged in an office of said corporation in the city of New York, in the transaction of its business,—*Held*, that they had an office for the regular transaction of business in person within the meaning of section 2638 of the Code of Civil Procedure,—which provides that a person named as executor in a will “against whom there is no objection except that of non-residence, is entitled to letters testamentary without giving a bond, if he has an office within the State for regular transaction of business in person, and the will contains an express provision to the effect that he may act without giving security.”[⁶,⁷]

Where one of three executors was, under the will, the beneficiary of the rents, profits and income of an estate,—*Held*, that the other two executors were entitled to the custody of the funds of the estate to such beneficiary’s exclusion, and an order would not be made, under section 2602 of the Code of Civil Procedure, requiring a deposit of the property of the estate to the joint creditor of the executors, and subject to their joint order.[⁸]

Bundy v. Bundy (47 *Barb.* 135; *aff’d*, 38 *N. Y.* 410), followed.[⁸]
(*Decided July 12, 1886.*)

Application by the executrix for the revocation of letters testamentary issued to her co-executors, or that they be required to deposit the funds of the estate to the joint credit of the executrix and executors and subject to their joint order.

The facts are fully stated in the opinion.

George W. Lyon, for petitioner and motion.

Abraham Underhill, for executors, opposed.

ROLLINS, S.—This testator left at his decease real and personal property of the value of about fifteen hundred thousand dollars. By his last will and testament, which was admitted to probate in February.

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1885, he appointed his daughter, Margaret S. Postley, executrix, and Hugh Cheyne and John Scott (whom he characterized as his "friends"), executors, declaring that he had entire confidence in their integrity, and therefore directed that they should not be required to give bonds for the faithful performance of their duties.

Upon the day the will was admitted to probate letters testamentary were granted, no person objecting, to all three of the above-named persons. At that time neither Mr. Cheyne nor Mr. Scott was a resident of New York. They both resided and have ever since resided in the State of New Jersey.

The decedent's entire estate, except a comparatively small amount bequeathed as legacies and annuities, is given by the will to his executors and executrix upon certain specified trusts. They are vested with authority to sell all or part of the real property in their discretion, to invest the proceeds thereof and the proceeds of the personal estate, to collect and receive the rents and income, and to "apply the said rents and income, as they accrue, to the use of my (his) daughter, Margaret S. Postley, during the term of her natural life, and at her death the said trust property shall go to her issue, if she leave any, but if she leave no issue, then my said executors shall pay out of the said trust property to my son-in-law," &c. Mrs. Postley, thus named in the will as executrix and *cestui que trust*, has filed a petition asking for relief in various forms against executors Cheyne and Scott.

FIRST. I am asked to revoke the testamentary letters of the respondents upon the ground that within the meaning of subdivision 5 of section 2685 of the Code of Civil Procedure, their "circumstances are such that they do not afford adequate security for the due administration of the estate."

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[1] This claim is not supported by the proofs.

Indeed, the averments of the petition, even considered apart from the answer, do not make out a case for revocation of letters under such fifth subdivision. The respondents are alleged to be "men of inconsiderable means not themselves transacting any business or having any place of business." That is all; and that is not enough (*Martin v. Duke*, 5 *Redf.* 597; *Grubb v. Hamilton*, 2 *Dem.* 414).

SECOND. The fact that the respondents reside without the State of New York is claimed to justify and require the revocation of their letters or the exaction of a bond for the petitioner's protection.

In opposition to this claim it is urged that as the respondents were non-residents when they obtained such letters, the mere continuance of that *status* is not of itself a sufficient ground either for pronouncing sentence of revocation or for requiring security.

Section 2636 of the Code of Civil Procedure provides that immediately after a will has been admitted to probate the persons therein named as executors, who are competent by law to serve, and who appear and qualify, "*are entitled* to letters testamentary," unless before such letters are granted some person interested in the estate interposes an objection, in the manner by such section indicated. The grounds upon which letters must or can be refused in case objection is made to their issuance are nowhere specified in the Code. A statute in force at the time the Code was enacted and abrogated by the General Repealing act of 1880 (*Laws of 1880*, chap. 245), declared that, with certain exceptions, which need not now be specified, a non-resident applicant should not be granted letters testamentary except upon giving a bond (§ 7,* article 1, title 2, chap. 6, part 2, Revised Statutes, 3 Banks,

*2 R. S. 70, § 7.

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6th ed. 73). While there is now no direct and explicit provision of law that an objection to the issuance of letters testamentary on the ground of the non-residence of the applicant must be sustained, unless such applicant executes a bond for the faithful discharge of his duties, the legislature has indicated by section 2638 of the Code its adherence to the policy of the repealed statute. That section impliedly recognizes the force of an objection based upon non-residence, by declaring that such an objection shall not prevent the issuance of letters *if* the applicant shall give a bond as prescribed by law.

['] In the absence of such opposition, however, letters may be properly issued without a bond, as they were in fact issued in the case at bar (Estate of Demarest, 1 *N. Y. Civ. Pro.* 302; Estate of Vernon, 1 *Id.* 304).

Now, the grounds upon which letters may be *revoked* are set forth in the eight subdivisions of section 2685 of the Code. None of these subdivisions can be claimed to have any reference to the question of non-residence, except the sixth, and possibly the first. The sixth is clearly inapplicable to such a situation as here exists, being in express terms limited to the case of an executor's removal or intended removal from the State *after* the issuance of letters. Subdivision 1 is operative only "where the executor was, when letters were issued to him, or has since become *incompetent or disqualified by law to act as such.*"

['] It is insisted by the petitioner's counsel that the case at bar falls within the subdivision just quoted. I am of a different opinion, and for several reasons.

First. Because if that subdivision relates to non-residence at all, it covers cases in which an executor becomes a non-resident *after* as well as cases in which

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he was a non-resident *before* obtaining letters. But such cases are distinctly and expressly provided for by subdivision 6. Of two possible constructions of subdivision 1 that should, of course, be preferred, other things being equal, which does not make subdivision 6 utterly superfluous.

Second. For the reasons stated by Surrogate LIVINGSTON and Surrogate CALVIN in Estate of Demarest and Estate of Vernon (*supra*), I hold that these respondents are not now and were not at the time of obtaining letters *incompetent or disqualified* by the fact of non-residence to act as executors. On the contrary, in spite of such non-residence they are and were competent and qualified, within the meaning of section 2638.

Third. There is still another reason for holding that an executor's non-residence is not sufficient warrant for revoking his letters, where he was such non-resident at the time the letters were granted and where his *status* as such non-resident has remained unchanged.

In the attempted transference into the Code of the well-considered scheme of the Revised Statutes in regard to non-resident executors, an important provision seems to have been overlooked. I refer to the provision which permitted an executor, whose letters were sought to be revoked on account of his removal or intended removal from the State, to prevent such revocation by the interposition of a bond (§§ 20 and 21, title 2, chap. vi., part 2, Rev. Stat., 3 Banks' [6th ed.] 75).* As the law now stands, this is impossible. If it is shown that after the grant of letters an executor has abandoned his residence within the State, or is about to abandon it, the surrogate must (except in

* 2 R. S. 72, §§ 20, 21.

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certain cases which will hereafter be noted), decree revocation.

Now, if section 2635 covers cases of non-residence which existed at the time of the grant of letters, this result follows: that though in the absence of objection, a non-resident executor has an absolute right to letters even without giving a bond, and though he has that right, even in the face of objection, upon furnishing such bond, the letters must as soon as granted be taken away, if any person interested in the estate demands it.

An interpretation which involves such absurd consequences should certainly be avoided if the language to be interpreted is capable of some other sensible construction.

[⁹] For the foregoing reasons I hold that when letters have been issued to a non-resident executor, they cannot be revoked merely because of his continued non-residence, nor can any bond be for that cause required of him.

THIRD. It is claimed by the respondents that even if they are wrong in the contention that I have just sustained, they are entitled to retain their letters testamentary without giving bond, by virtue of the last clause of section 2638 (*supra*). That clause declares that a person named as executor in a will, "against whom there is no objection except that of non-residence, is entitled to letters testamentary without giving a bond, if he has an office within the State for the regular transaction of business in person, and the will contains an express provision to the effect that he may act without giving security." There is no dispute about the facts to which this provision is claimed to be applicable.

[⁹] The Singer Manufacturing Co. is a foreign corporation organized under the laws of New Jersey. It has had for many years, and now has, an office in

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the city of New York. In that office both of these respondents are personally engaged from day to day in the transaction of the business of the corporation. One of them, Mr. Cheyne, is a stockholder of such corporation, its treasurer, and a member of its board of directors. The other, Mr. Scott, has long been, and is now, its cashier. Mr. Commissioner Throop, in a note to section 2638 of his edition of the Code, says that that section is intended as a consolidation of a part of section 6, tit. 2, chap. vi., part 2, Rev. Stat.* (3 Banks' [5th ed.], 155), and of chapter 657 of the Laws of 1873—and adds that “the description of a person having a place for the transaction of business within the State, has been modified so as to correspond with the expression used *in pari materia* throughout this act”—(that is, throughout part 2 of the Code).

The Revised Statutes (section 7 of the title just cited) made the issuance of letters to non-resident executors conditional upon the execution of a bond, allowing no exception in case of such non-residents as might be engaged in business within the State. This provision was amended by the act of 1873, above referred to, so as to read as follows :

“Such non-resident executor may receive such letters without bonds if the testator, by words in his last testament, has requested that his executor be allowed to act without giving bonds, *and if such executor has his usual place of business within this State.*”

There could scarcely have been any difficulty in interpreting that provision. I think that such a case as the present would clearly have fallen within it. Now, does the provision by which it has been displaced cover substantially the same ground, or has it a narrower scope or a wider?

* 2 R. S. 70, §§ 6, 7.

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Sections 3160 and 3169 of the Code are evidently the sections to which Mr. Throop refers in his note above quoted. Section 3160 provides that where the plaintiff in an action brought in the marine court has "an office for the regular transaction of business in person" within the city of New York, he shall be deemed a resident of that city within the meaning of sections 3268 and 3269, which relate to security for costs. Section 3169 prescribes the proofs necessary to be adduced in obtaining from a justice of the marine court a warrant of attachment, and declares that when the ground of the application is, that the defendant is a non-resident of the city of New York, it must appear by affidavit that such defendant "has not an office within that city where he regularly transacts business in person."

From Mr. Throop's preliminary note, to the title of which sections 3160 and 3169 from a part, it appears that in his view those sections were meant to be a substantial reproduction of chapter 136 of the Laws of 1876, which declares that "no person being a resident of the State of New York, who shall have a *place of business* in the city of New York, shall be deemed to be a non-resident under the provisions of this act."

I agree with Mr. Throop in thinking that the expression "usual place of business" as it was ['] employed in chapter 657 of the Laws of 1873 is co-extensive in meaning with the expression "office for the regular transaction of business in person," now appearing in section 2638. And upon the proofs submitted in this proceeding, I hold, that by virtue of the last clause of that section, the respondent executors, when they obtained letters, would have been entitled thereto without a bond, even though the grant of such letters had been opposed on the score of non-residence, and that accordingly the appli-

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cation for the revocation of letters because of such non-residence must be denied.

FOURTH. The petitioner asks that in case she shall be found entitled to no other relief, the surrogate shall, in the exercise of his discretionary authority under section 2602, direct a deposit of the property of the estate to the joint credit of the executors and executrix, and subject to their joint order.

[*] I should give this direction if I did not feel constrained by the authority of *Bundy v. Bundy* (47 *Barb.* 135; aff'd, 38 *N. Y.* 410), to sustain the respondents' contention that, in view of the provisions of the will making the petitioner the beneficiary of the rents, profits and income, they themselves are entitled to the custody of the funds of this estate to the petitioner's exclusion. I cannot find that *Bundy v. Bundy* has ever been overruled or adversely criticised.

The petitioner's application must be in all things denied.

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